TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 297

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY,
PLAINTIFF IN ERROR,

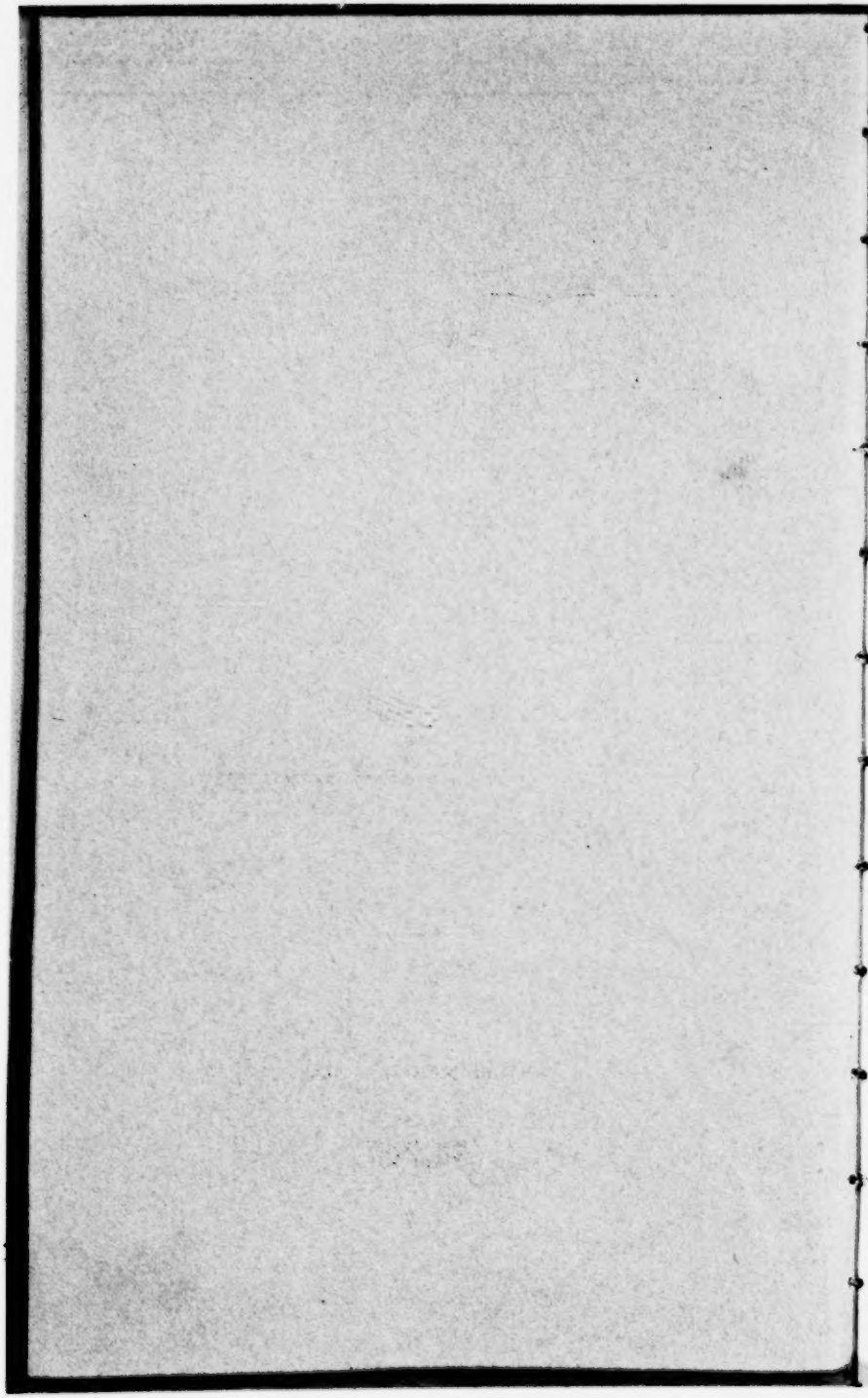
vs.

THE STATE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED MARCH 8, 1922.

(28,755)



(28,755)

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OCTOBER TERM, 1921.

No. 800.

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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1 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Fifth Circuit, October Term, 1918.

THE STATE OF SOUTH CAROLINA, Respondent,

vs.

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, a Corporation Created by and under the Laws of the State of South Carolina, Appellant.

Appeal from Richland County.

Hon. W. H. Townsend, Circuit Judge.
Hon. R. W. Memminger, Circuit Judge.

Case.

Hon. Thomas H. Peeples, Attorney General,
B. L. Abney, Esq.,
J. Fraser Lyon, Esq.,
Attorneys for Respondent.

Wm. Elliott, Esq.,
J. B. S. Lyles, Esq.,
Attorneys for Appellant.

2 *Statement.*

This is an appeal from an order and decree of Hon. W. H. Townsend, Presiding Judge, dated and filed June 29, 1918, before the final adjournment of the Court, overruling defendant's demurrer to the complaint, and also from an order of Hon. R. W. Memminger, Presiding Judge, dated and filed January 17, 1918. This motion was heard, upon notice, by the Honorable R. W. Memminger, that it would be taken up before him at the court house in Richland County, Fifth Circuit, at which he was presiding as Judge, and was then and there heard in accordance with said notice. This order refused defendant's motion to approve and accept its petition and bond for the removal of this case into the District Court of the United States for the Eastern District of South Carolina.

Suit was commenced December 11, 1917, by service of a summons in due form and of the following complaint, which was verified by Thos. H. Peeples, Attorney General:

Complaint.

Now comes Thomas H. Peeples, Attorney General of the State of South Carolina, and for and in behalf of said State alleges and informs the Court as follows:

1. That on and before the 24th day of December, 1887, the State of South Carolina, by reason of its sovereign rights and prerogatives, as well as by acquisition, was seized in fee and possessed of the property situate, lying and being in Richland County, in said State, located along and adjacent to the Congaree and Broad Rivers, and on the east side thereof, known as the Columbia Canal, together with the lands now held therewith, acquired under the Acts of the General Assembly of this State with reference thereto or otherwise, all and singular the rights, members and appurtenances thereto
3 belonging, together with all easements, rights-of-way and rights of overflow, from its source at Bull's Sluice on Broad River, through its whole length to the point where it empties into the Congaree River, at or near the mouth of Rocky Branch.

2. That by an Act entitled, "An Act to Incorporate the Board of Trustees of the Columbia Canal, to transfer to the said Board the Columbia Canal with the lands now held therewith, and its appurtenances, and to develop the same," approved December 24, 1887 (19 Stat. S. C., 1090), the General Assembly of the said State, by Section 1 enacted, among other things: "That the Board of Directors of the South Carolina Penitentiary are hereby authorized, empowered and required to transfer, assign and release to the Board of Trustees of the Columbia Canal, hereinafter created and provided for, the property known as the Columbia Canal, together with the lands now held therewith, acquired under the Acts of the General Assembly of this State with reference thereto or otherwise, all and singular the rights, members and appurtenances thereto belonging; and upon such transfer, assignment and release all the right, title and interest of the State of South Carolina in and to the said Columbia Canal and the lands now held therewith, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, together with all the appurtenances thereunto belonging, shall vest in the said Board of Trustees for the use and benefit of the city of Columbia, for the purposes hereinafter in this Act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the said Board of Trustees and their assigns: Provided, That should the said canal not be completed to Gervais Street within seven years from the passage of this Act all the rights, powers and privileges guaranteed by this Act shall cease, and the said property shall revert to the State."
4 And, by Section 2: "That the said Board of Trustees are hereby authorized and directed, for the development of the said canal, to take into their possession the said property with all its appurtenances; and for the purpose of navigation, for providing an adequate water power for the use of the Penitentiary and

for other purposes hereinafter named, they are hereby authorized, empowered and directed to improve and develop the same."

And, by Section 3: "That in order to improve and develop the power of the said canal for navigation, to furnish the city of Columbia with an adequate supply of water and other hydraulic purposes, they are authorized to construct a dam across Broad River at, above or below the head of the present canal, as, by survey already made or hereafter to be made, may be deemed advisable for the development of the said water power; and in locating and constructing the said dam, they shall have the right to raise the water in the Broad River to such a height as will give a head and fall of thirty-seven feet at the south side of Gervais Street at mean low water; with the right to build all necessary banks, abutments and other structures on both sides of said river as may be required to complete the said dam; and the right is hereby given to widen and deepen the said canal throughout its length, from its source at Bull's Sluice to the Congaree River, at or near the mouth of Rocky Branch, on the general line of the canal, with such deflections therefrom as to them may seem expedient for the better development of the said water power: Provided, That the canal be so enlarged as to carry a body of water 150 feet wide at the top of the water, 110 feet wide at the bottom and ten feet deep, and shall develop at least 10,000 horse-power at the south side of Gervais Street: Provided, further, That a suitable fishway for the free passage of fish be constructed in the said dam."

5 And, by Section 4: "That the said Board of Trustees shall have the right-of-way, and the same is hereby granted, in and along said course of the canal, for the construction and operation of the same; if in enlarging and developing the said canal, or in constructing the said dam, it becomes necessary to use the private property of any person or corporation for that purpose, the said Board of Trustees, for the sake of the public improvement contemplated in the construction of the said canal, and the better navigation of the said Broad River and Congaree River, and the transportation of supplies to market, shall have the right to acquire such right-of-way in the manner now provided by law."

And, by Section 5: "That the said canal shall be opened for navigation free of charge by the said Board of Trustees, the State reserving the right to make such improvements in the canal as may be necessary to promote navigation through the canal more rapidly than can be accomplished by the Board under this Act: Provided, The said Board of Trustees or lessees of the water power are indemnified against any damages arising therefrom."

And, by Section 6: "That the said Board of Trustees are required to build only one bridge over the canal, to-wit: One on Gervais Street. That the said Trustees or assigns shall not be required to build any draws or passageways through any other bridge across the canal, unless they voluntarily build additional bridges and draws or passageways therein shall become necessary for purposes of navigation; if such draws and passageways or bridges other than those above provided for should be built they shall not be required to work the

same except for their own benefit, nor shall they be required to attend on any locks which may be built."

And, by Section 7: "That the Board of Trustees shall, within two years from the ratification of this Act, complete the said canal
6 so as to carry a body of water 150 feet wide at the top, 110 feet wide at the bottom and ten feet deep, from the source of the canal down to Gervais Street, and to furnish to the State, free of charge, on the line of the canal, 500 horse power of water power, to Sullivan Fenner or assigns 500 horse power of water power, under his contract with the Canal Commission, and to furnish the City of Columbia 500 horse power of water power at any point between the source of the canal and Gervais Street the city may select; and shall, as soon as is practicable, complete the canal down to Congaree River a few yards above the mouth of Rocky Branch: Provided, That the right of the State to the free use of the said 500 horse power shall be absolute, and any mortgage, assignment or other transfer of the said canal by the said Board of Trustees or their assigns shall always be subject to this right.

Sections 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of said Act are omitted herefrom, but judicial notice thereof is hereby craved as often as may be necessary.

By Section 19 of said Act, it was enacted: "To insure the prompt development of the said canal, and to enable the Board of Trustees to offer inducements for the speedy erection of factories on the canal below Gervais Street, the said Trustees are authorized and required, before they shall employ any of the proceeds of said bonds (the bonds alluded to in the sections above omitted) in developing the canal below Gervais Street, to secure, by contract or purchase, and control, land on the canal south of Gervais Street, with frontage sufficient for at least two mill sites suitable for the erection of factories of 20,000 spindles each."

That in and by Sections 20 and 21, a Board of Trustees of the Columbia Canal was created a body politic and corporate, its corporate name*d* to be "Board of Trustees of the Columbia Canal," consisting of five members—the Mayor, ex-officio, a member, and the other four to be elected by the Mayor and Aldermen of the
7 city of Columbia, one from the City Council, and the other three from the citizens of Columbia at large; that its officers shall be a Chairman and a Secretary and Treasurer, its duties being prescribed by said Act.

3. That by an Act approved the same date—the 24th day of December, 1887—the General Assembly authorized the city of Columbia to guarantee and pay the coupons on bonds to be issued by the Board of Trustees of the Columbia Canal under the aforesaid Act, and prescribed the manner in which the city of Columbia should hold an election for the legal voters of same to determine whether or not the city should guarantee and pay the coupons on the bonds to be issued by the board of Trustees of the Columbia Canal as they matured. That such election was held in accordance with the provisions of said Act, and a majority of the votes were cast in favor of guaranteeing the payment of the coupons on said

bonds, as prescribed; and reference is craved to the said Act, if such is necessary, and that judicial notice thereof shall be taken.

4. That in pursuance of said Act, on the —— day of February, 1888, the Board of Directors of the South Carolina Penitentiary, under and by virtue of the power and authority and requirements of the first above mentioned Act, and after the city of Columbia had complied with the second Act hereinabove mentioned, and had voted to guarantee and pay the coupons on the bonds issued by the Board of Trustees of the Columbia Canal, as they matured, and said Board had organized in accordance with and pursuant to the terms and provisions of said Act, "granted, transferred, assigned and released to said Board of Trustees all the right, title and interest of the State of South Carolina in and to the Columbia Canal, and the lands now held therewith acquired under the Acts of the General Assembly of this State, with reference thereto or otherwise, from its source at Bull's Sluice through its whole length to the point where
8 it empties into the Congaree River with all and singular the rights, members and appurtenances thereto belonging for the use and benefit of the city of Columbia, for the purposes set forth and expressed in said Act, subject, nevertheless, to the performance of the conditions and limitations therein set forth and prescribed on the part of the said Board of Trustees and their assigns: Provided, That should the said canal not be completed to Gervais Street within seven years from the passage of said Act all the rights, powers and privileges guaranteed by said Act shall cease, and the said property shall revert to the State:

To have and to hold all and singular the above described premises and their appurtenances unto the said Board of Trustees of the Columbia Canal, their successors and assigns forever subject to the provisions and conditions aforesaid"—the said property being the same as that described in paragraph one hereof. That the said Board of Trustees immediately thereafter took possession of the said property and commenced the development thereof for water power and for navigation, as set forth in said aforementioned Acts.

5. That the General Assembly of the State of South Carolina passed an Act, approved December 24, 1890, amending the Act of December 24, 1887, first above mentioned, among other things being added a new proviso to Section 3, which diminished the dimensions of said canal south of Gervais Street; and, by amending Section 23 thereof, by adding thereto the following: "But the said Board of Trustees shall have full power and authority, before the said canal has been fully developed and completed and turned over to the city of Columbia, to sell, alienate and transfer the same and all its appurtenances, the lands held therewith, and all the rights and franchises conferred by this Act on said Board of Trustees, to any person or corporation, subject, however, to all the duties and
9 liabilities imposed thereby, and subject to all contracts, liabilities and obligations made and entered into by said Board prior to such sale and transfer, upon the approval and consent of nine members of the City Council of the city of Columbia; and before

such sale, alienations and transfer is made, thirty days' notice of the offer to purchase and the terms thereof shall be given to the Council of the city of Columbia." That reference is craved to this Act, and that the Court may take judicial notice thereof.

6. That the Columbia Electric Street Railway, Light and Power Company was created and organized by and under an Act of the General Assembly of the State of South Carolina, approved December 16, 1891 (20 Stats., 1453), having such franchises, rights, powers and privileges as therein granted, and such as were also contained in amendatory Acts, and thereafter conducted its business under said name until May —, 1911, when its corporate name was, under the laws of the State of South Carolina, duly changed to the corporate name of Columbia Railway, Gas and Electric Company, under which last mentioned name it has since then conducted its corporate business and been known, and is the defendant above named.

7. That said Board of Trustees continued in possession of said property, under the Acts hereinabove mentioned, until the 20th day of January, 1892, when, by the authority of the provisions of Section 23, as amended, of the Act of December 24, 1887, the said Board of Trustees conveyed to the Columbia Water Power Company, its successors and assigns, by deed dated the 11th day of January, 1892, but not consented to until the 20th of January of the same year by the Mayor and nine Aldermen of the City Council of Columbia (the consent of said nine members of said City Council having been given in accordance with the provisions in said Act contained)—the said Columbia Water Power Company being at that time a corporation created, organized and existing under the laws of the State of South Carolina— the said property being described as follows: "All that property, situate, lying and being in the State of South Carolina, in and near the city of Columbia, known as the Columbia Canal, and the lands held therewith acquired under the Acts of the General Assembly of said State with reference thereto, or otherwise, from its source at Bull Sluice through its whole length to the point where it empties into the Congaree River, at or near the mouth of Rocky Branch, including all lands, easements, rights-of-way, rights of overflow and appurtenances acquired by the said Board of Trustees of the Columbia Canal in the development and improvement of the said canal or otherwise, whether the same be in Richland County or Lexington County, together with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining, and together with all the rights and franchises conferred by the Acts of the General Assembly of the State of South Carolina on the said Board of Trustees of the Columbia Canal, excepting therefrom, for the use of the city of Columbia, a strip of land on the east and west side of the said canal from the north side of Laurel Street to the south side of Blanding Street";

"To have and to hold all and singular the premises before mentioned unto the said Columbia Water Power Company, their successors and assigns forever, subject, nevertheless, to the conditions, limi-

tations, provisos and exceptions set forth and prescribed in the Acts of the General Assembly of the State of South Carolina heretofore mentioned, and subject to the provisions of the proposition of George Wallace, of July 11th, 1891."

8. That thereafter the said Columbia Water Power Company took possession of said canal, under said Acts and said conveyances and did proceed to utilize and use the same in accordance with the terms and provisions of said Acts, and to construct a power house and to sell power generated by water from the canal to manufacturing interests in and around the city of Columbia, and to keep open for navigation, free of charge, the said canal, down to Gervais Street, as prescribed by Section 5 of the Act of December 24, 1887; that on the first day of July, 1905, it conveyed the said property to the Columbia Electric Street Railway, Light and Power Company, now the defendant Columbia Railway, Gas and Electric Company, and made and executed its deed of conveyance to that company, whereby it granted, bargained, sold and released, among other things, the following property:

"1. All that property situate, lying and being in the State of South Carolina, in and near the city of Columbia, known as the Columbia Canal, and the lands held therewith acquired under the Acts of the General Assembly of said State with reference thereto, or otherwise, from its source at Bull's Sluice through its whole length, to the point where it empties into the Congaree River, at or near the mouth of Rocky Branch, including all lands, easements, rights-of-way, rights of overflow and appurtenances acquired by the Board of Trustees of the Columbia Canal in the development of the same, or otherwise, whether in Richland County or Lexington County, together with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in any wise incident or appertaining, and together with all the rights and franchises conferred by the Acts of the General Assembly of the State of South Carolina on the said Board of Trustees of the Columbia Canal; the property, rights, privileges and franchises hereby sold and conveyed being the same as were conveyed to The Columbia Water Power Company by the Board of Trustees of the Columbia Canal by deed dated the twentieth (20th) day of January, A. D. eighteen hundred and ninety-two (1892) (excepting therefrom the right of the Columbia Mills Company of South Carolina to that part of the western embankment of the canal conveyed to it on the second (2) day of March, A. D. eighteen hundred and ninety-four (1894) by The Columbia Water Power Company), subject, however, to the conditions, limitations, provisos and exceptions set forth and declared in the said deed of conveyance. Also the power station of The Columbia Water Power Company, located on the western bank of the canal near Gervais Street, in the city of Columbia, including the turbine waterwheels, dynamos, governors, switchboards, and other machinery, therein (except a switchboard connection which belongs to the State), and also all transmission lines of poles and wires and all transformers and other electrical apparatus for the delivery of electrical current for power and light-

ing purposes belonging to said company, but installed on the premises of the several parties with whom it has contracts for supply of power. And also all easements, rights-of-way and rights of overflow acquired by purchase or condemnation by The Columbia Water Power Company subsequent to the deed of conveyance of date twentieth (20th) January, A. D. eighteen hundred and ninety-two (1892), above mentioned, and now belonging to said company."

The said property being the same described in the first aforementioned Act, with improvements thereafter made and easements, rights-of-way and rights of overflow thereafter acquired by purchase or condemnation by The Columbia Water Power Company in pursuance of the powers contained in the aforesaid Act of 1887. And, that the defendant herein took possession and control of said
13 property and retains such possession and control to the present time.

9. That in and by said Act of 1887, it is provided, by Section 1, that the conveyance by the said Board of Directors of the South Carolina Penitentiary to the Board of Trustees of the Columbia Canal, that the property shall vest in the Trustees for the use and benefit of the city of Columbia, for the purposes thereinafter mentioned, subject, nevertheless, to the performance of the conditions and limitations therein prescribed on the part of the said Board of Trustees and their assigns: Provided, That should the said canal not be completed to Gervais Street within seven years from the passage of this Act all the rights, powers and privileges guaranteed by this Act shall cease, and the said property shall revert to the State.

And it is, by Section 3 of said Act, provided:

"Sec. 3. That in order to improve and develop the power of the said canal for navigation, to furnish the city of Columbia with an adequate supply of water and other hydraulic purposes, they are authorized to construct a dam across Broad River at, above or below the head of the present canal, as by survey already made or hereafter to be made, may be deemed advisable for the development of said power; and in locating and constructing the said dam, they shall have the right to raise the water in the Broad River to such a height as will give a head and fall of thirty-seven feet at the south side of Gervais Street at mean low water; with the right to build all necessary banks, abutments and other structures on both sides of said river as may be required to complete the said dam; and the right is hereby given to widen and deepen the said canal throughout its length, from its source at Bull's Sluice to the Congaree River, at or near the mouth of Rocky Branch, on the general line of the canal, with such deflections therefrom as to them may seem expe-
14 dient for the better development of the said water power: Provided, That the canal be so enlarged as to carry a body of water 150 feet wide at the top of the water, 110 feet wide at the bottom and ten feet deep, and shall develop at least 1 000 horse power at the south side of Gervais Street: * * *."

That with regard to the provisions hereinabove set forth of said Act of 1887, the plaintiff alleges and informs the Court that neither the Board of Trustees of the Columbia Canal nor its assignees or its conveyees, The Columbia Water Power Company, or the defendant, has ever proceeded any further with the construction of the canal than the north side of Gervais Street, and has not developed the 10,000 horse power on the south side of Gervais Street, as was required and was one of the conditions upon which the said Act was passed. That the said canal has been, by the Board of Trustees, carried as far as its present southern terminus, to the north side of Gervais Street and no further, and the plaintiff is informed and believes that the said 10,000 horse power required at the south side of Gervais Street has never been developed or complied with, nor any dam constructed or raised sufficient to develop such power.

By Section 5 of said Act, it is one of the conditions and limitations prescribed therein, "That the said canal shall be opened for navigation free of charge by the said Board of Trustees, the State reserving the right to make such improvements in the canal as may be necessary to promote navigation through the canal more rapidly than can be accomplished by the Board under this Act: Provided, The said Board of Trustees or lessees of the water power are indemnified against any damage arising therefrom." And, the plaintiff alleges that such condition has never been complied with, but on the contrary the said defendant, formerly known as The Columbia Electric Street Railway, Light and Power Company, allowed the locks at the northern entrance of the canal to become so out of repair that it has never been used, and prior to the passage of the Act hereinafter mentioned, could not be used for navigation; that for lack of repairs, it has permitted it to fall into decay, as well as its water gates to be choked, to become unworkable and filled up with mud; that it has placed obstructions at the entrance of said locks from the canal into the Broad River, and vice versa, so that the same can not now be at all used for any kind of navigation; that it has allowed and permitted the city of Columbia, contrary to its duty and its obligations, and in violation of the conditions upon which the said property was conveyed by the State, through the Board of Directors of the Penitentiary to the Board of Trustees, to place waterpipes, mains and bridges across the canal at the City Waterworks, which effectually bar and obstruct the navigation for any kind of craft from proceeding further; that it has also permitted and allowed the Columbia Mills, a corporation then known as the Columbia Mills Company, to construct a bridge opposite its mill across the canal, whose height is such as not to permit the passage of any craft of any kind which might desire to use the waters in the canal, either for carrying freight or for boats of pleasure.

10. That by Section 7 of said Act, it is enacted: "That the Board of Trustees shall, within two years from the ratification of this Act, complete the said canal so as to carry a body of water 150 feet wide at the top, 110 feet wide at the bottom and ten feet deep, from the source of the canal down to Gervais Street, and to furnish to the

State, free of charge, on the line of the canal, 500 horse power of water power, to Sullivan Fenner or assigns 500 horse power of water power, under his contract with the Canal Commission, and to furnish the city of Columbia 500 horse power of water power at any point between the source of the canal and Gervais Street the
16 city may select; and shall, as soon as practicable, complete the canal down to Congaree River, a few yards above the mouth of Rocky Branch; * * *."

That one of the main and principal inducements moving the State of South Carolina to direct a conveyance of said property to the Board of Trustees was for the purpose of making more navigable the Columbia Canal, which had existed for many years prior thereto, and which it had under construction, so that the waters of the same might make connection with the waters of the Congaree River and thereby pass around the shoals in the Congaree and Broad Rivers, and keep a continuous line of communication navigable for boats on the Broad River as well as on the Congaree River and to bring the commerce which could be carried on said rivers up to and within the city limits of the city of Columbia; but, notwithstanding such conditions and limitations declared by said Acts with regard thereto, neither The Columbia Water Power Company nor the defendant has in any way attempted to dig and construct the canal from the north side of Gervais Street down to Rocky Branch, a distance of about a mile and a half, where it enters into the Congaree River, either for the purpose of navigation or for the development of power, nor have the said parties complied with the conditions to keep the canal open for navigation free of charge even to the north of Gervais Street, but has practically prevented, in various ways, boats or smaller craft from using the waters of the canal either for business or for pleasure, and the defendant has, by allowing mud to accumulate, to make impassable certain places in the canal, which practically destroys every feature of navigation, and has to a great extent abandoned the canal for the development of water power, to the great injury and damage to the citizens of the State and to the great damage and injury to the property so conveyed to it, to the use and purposes for which it was originally constructed and
17 designed to be enlarged and developed, and for which it was conveyed to the parties aforesaid. That it has not kept up in proper repair its dam at the head of the canal, but has allowed the bents in the same to become washed out and the riprapping upon the walls of the canal to become in such bad repair that any large freshet in the river may wash the same away and probably destroy the greater portion of the entire canal property.

The Attorney General, for and in behalf of the State of South Carolina, alleges and informs the Court that it is greatly to the interest of the State and its citizens that the said canal should be constructed as designed and as contemplated in said Act for navigation throughout its entire length, and that the conditions upon which said canal was conveyed by the Board of Directors of the Penitentiary to the Board of Trustees have been violated by the defendant; and that it has for a long time been practicable to carry out the

terms of said Act and to complete the canal down to the Congaree River a few yards above the mouth of Rocky Branch; but notwithstanding this, the defendant fails and refuses to perform its contract and obligation in that behalf undertaken.

11. That the General Assembly of the State of South Carolina, by an Act entitled: "An Act to Declare that the Columbia Canal, and its appurtenances, and the Interest of the State in and to the Columbia Canal, Authorized to be Transferred under an Act entitled, 'An Act to Incorporate the Board of Trustees of the Columbia Canal, to Transfer to the said Board the Columbia Canal, with the lands now held therewith, and its appurtenances, and to develop the same,' approved December 24th, 1887, and Acts supplemental or amendatory thereof, shall revert to the State by reason and on account of the violation of the conditions contained in said Acts, and to provide provisions relating to the operation, management, control, disposal or sale of said canal," did find that the Board of Trustees of the
18 Columbia Canal, or its assigns, to-wit: The Columbia Water Power Company, and the defendant, failed and neglected to fulfill the conditions in said Act set forth and refused to perform the said conditions and had further neglected to keep in proper repair and open for navigation the said canal, and remove the damage and injury that was being committed to the property so authorized to be transferred by the General Assembly of the State of South Carolina, under the aforesaid Act. And, by Section 1 thereof, declared: "That the conditions of the Act of the General Assembly hereinabove mentioned, and the Acts supplemental or amendatory thereof, have not been complied with, but that the same have been disregarded, and by reason thereof the right, title and interest of the State to the said Columbia Canal, its appurtenances and the lands held therewith, so transferred by virtue of said Acts, have been forfeited and reverted to the State."

And by Section 2, provided: "That the Attorney General and the chairman of the Judiciary Committee of the Senate and House of Representatives, the chairman of the Finance Committee of the Senate and the chairman of the Ways and Means Committee of the House of Representatives, be, and they are hereby, empowered and authorized and directed, or a majority of them, ninety (90) days after the approval of this Act, to make such re-entry for and in behalf of the State as may be necessary and proper under the circumstances, and to take such steps as may be lawful and proper in the premises to obtain possession and control of the property of the said Columbia Canal, its appurtenances and the lands held therewith, and the improvements placed thereon by those in possession, which have become a part and parcel of said canal, unless the claimants enter into arrangements satisfactory to said officers as herein provided; and, further, to take such possession, control and direction of the development of the water power originally contemplated
19 by said Acts, and to dispose of the same, in such way as they may deem advisable and proper, for the interest of the State."

12. The Attorney General for and in behalf of the State f
informs the Court that in pursuance of such authority, it did
the defendant through its proper officers, its president and g
manager, that they were ready and willing to enter into satisf
arrangements with them with regard to said canal; that the sa
fendant, through its proper officers, failed and declined to mak
satisfactory arrangements with them within the time limite
stated in said Act.

That in and by Section 3 of said Act, it is enacted: "Th
Attorney General, for and in behalf of the State, do at the tim
vided for the re-entry or thereafter, commence such proceedi
he may deem proper and advisable, in any of the Courts of this
to assert the right of the State in and to said canal proper
hereinabove described, and the structures and improvements
thereon, which have become a part of said canal, and for the fi
protection of said canal from injury and neglect, for keepin
same in proper condition and repair; and, further, that he i
powered and authorized to bring such action for such damages
State of South Carolina has suffered by reason of the failure
asignees and conveyees of the Board of Trustees of said prope
perform the conditions contained in said Acts hereinabove
tioned, and in the several conveyances thereto made to them
the said Board of Trustees, and enjoined and provided for in
Acts: * * *."

That the Attorney General of the State of South Carolina,
Thomas H. Peeples, the chairman of the Judiciary Committee
Senate, Hon. Huger Sinkler, the chairman of the Judiciary
mittee of the House of Representatives, Hon. Jesse W. Boyd
chairman of the Finance Committee of the Senate,
20 Niels Christensen, and the chairman of the Ways and
Committee of the House of Representatives, Hon. J. T.
being the officers designated by said statute to make re-entry
said property, did on the 10th day of August, 1917, duly give
to Columbia Railway, Gas and Electric Company, through its
dent, Edwin Wales Robertson, and its general manager, A. L.
yon, that it had failed to make satisfactory arrangements with
to the said canal, and made demand upon the defendant, th
lumbia Railway, Gas and Electric Company, and its president
win Wales Robertson, and its general manager A. L. Kenyo
the possession, and control of said property set forth and desc
in said Act, and did further give notice that they would, upo
20th day of August, 1917, at twelve o'clock noon, make re-
upon and in behalf of the State and take possession and cont
said property; and, that the said company, its agents and serv
from thence on should cease to take or have any manageme
control of said property, and to surrender the possession of
peacefully and in a proper manner to the said State officers, el
able with the management, control and direction and develop
of the water power, and for carrying out the completion o
canal for navigable purposes, as contemplated by the aforesaid
and dispose of the same in such way as they may deem advi

and proper for the interest of the State. And further notified the said defendant, and its officers above mentioned, its agents and employees, that any attempt upon their part to interfere with, impede, obstruct, the possession, control and management of said property as authorized by provisions of the Act approved March 12th, 1917, or in any manner trespass upon said property after the re-entry made by them, mentioned in said notice, would be considered and treated as a trespass.

21 That the said Columbia Railway, Gas and Electric Company, by Wm. Elliott and J. B. S. Lyles, its attorneys, did acknowledge receipt of their notice and deny in toto the claims of the Commission concerning the Columbia Canal, and further warned and notified each of them to refrain from interfering with or trespassing upon its possession, management or control of the Columbia Canal, and its appurtenances, and notified them that it would hold each of them personally and individually responsible for any interference with or trespass committed upon its property or possession. And further advised them that said Act of 1917, to which the said Attorney General and other officers of the State referred, and under which they claim authority, is null and void because it violates the Constitution of the United States and of South Carolina.

That thereupon the said Attorney General and the other members of the Committee set forth in the said Act, notified the said Columbia Railway, Gas and Electric Company, through its attorneys, that they claimed possession and control of the said property described in the said Act and in said letter of August 10th address to them, and for and in behalf of the State of South Carolina claimed possession and control of said property from and after twelve (12) o'clock noon of the present day (August 20th, 1917,) and that the re-entry mentioned in paragraph 2 of said Act had by reason of the notice heretofore served upon it and its reply thereto, had performed the direction of said Act in such way as was proper under the circumstances; and, that the State of South Carolina, by and through them, in its behalf, claim the possession and control of said property, its development and disposal in accordance with the terms and provisions of said Act.

That the Attorney General, and the said officers mentioned in paragraph 2 of said Act, upon consideration, do not conceive

22 that it was appropriate and proper for them, as representatives of the State of South Carolina, to commit a breach of the peace in making forcibly entry upon said property and taking possession thereof; that, therefore, by virtue of the provisions of paragraph 3 of said Act, this action is instituted by the Attorney General to recover possession of the said property, as hereinabove described, and in said Acts mentioned, which the defendant is now in the unlawful possession thereof and withholding the same from the said State.

That the plaintiff is entitled to damages for the withholding of the same by the defendant from the 20th day of August, 1917, in such amount as the defendant has received, or should have received,

from the use of the water power since that time, up to the bringing of this action. That this action is brought only for the above purposes and not for such damages as the State of South Carolina has suffered by reason of the failure of the Board of Trustees of said property, and its assignees or conveyees, to perform the conditions contained in said Acts hereinabove mentioned, and in the several conveyances thereto made to them from the said Board of Trustees and enjoined and provided for in said Acts, or for any damages which may have arisen to the State by reason of the unlawful conduct, management and control of said property.

Wherefore, the plaintiff demands judgment for the possession of the said premises and for such income or rentals as the defendant may have received from the withholding of the same since the 20th day of August, 1917.

(Signed) THOS. H. PEEPLES,
Attorney General of South Carolina.
(Signed) B. L. ABNEY,
(Signed) J. FRASER LYON,
Attorneys for the State of South Carolina.

On the 26th day of December, 1917, the defendant duly served upon plaintiff a notice that, before the time for answering
23 or pleading expired, it would file a petition in the office of the Clerk of Court of Common Pleas for Richland County praying that the case be removed to the District Court of the United States for the Eastern District of South Carolina, and would file therewith a bond as required by the federal statute.

On December 28, 1917, plaintiff served upon defendant a notice that it denied the right of defendant to remove said cause to the Federal Court, and would resist the motion in the State Court to accept defendant's petition and bond, etc., and, further, that defendant's notice did not specify any particular time at which the petition and bond would be filed in the state Court, or when the State Court would be asked to accept the same, etc., and requested that defendant should notify plaintiff, in due time, of its motion before the State Court so that plaintiff might resist the same.

On December 29, 1917, defendant duly served upon plaintiff and filed the following:

Demurrer.

Now comes the defendant herein, expressly reserving its right to remove this case into the District Court of the United States for the Eastern District of South Carolina, and demurs to the complaint herein upon the ground that it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action, in that:

(1) It appears upon the face of the complaint that there is no condition contained in the Acts of the General Assembly of South Carolina, approved December 24, 1887, or the amendatory Act of December 24, 1890, or in the deeds of conveyance to this defendant,

or its predecessors in title and interest, or as otherwise alleged in said complaint, the violation of which works a forfeiture and entitled plaintiff to the possession of the property in question or the rental or income thereof since August 20, 1917.

24 (2) That the complaint alleges no facts working a forfeiture of or entitling plaintiff to the possession of the property in question.

(3) That the complaint does not allege any re-entry entitling plaintiff to judgment of forfeiture or possession.

(4) That it appears upon the face of the complaint that defendant and its predecessors have been in quiet and peaceable possession and enjoyment of the property for more than twenty years since all and any conditions found in the Acts of the General Assembly of South Carolina, approved December 24, 1887, and December 24, 1890, or in the deeds of conveyance to defendant, or its predecessors, or otherwise alleged in said complaint, became effective or operative and such conditions have been duly complied with or duly waived by the State of South Carolina.

(5) That it appears upon the face of the complaint that the right or title of the State of South Carolina have not accrued within twenty years, and the State of South Carolina has not within twenty years received any rents or profits from the real estate in question, or any part thereof, and by virtue of the provisions of Section 120 of the Code of Civil Procedure, this action cannot be maintained.

(6) That the Act of the General Assembly of the State of South Carolina, approved March 12, 1917, and the acts of the officers of the State of South Carolina therein authorized, including the commencement of this action, are in violation of and repugnant to Section 10 of Article I of the Constitution of the United States, in that they impair the obligation of defendant's contract with the State of South Carolina made by the deeds to defendant and its predecessors under the Acts of the General Assembly of South Carolina, set forth in the complaint.

(7) That the Act of the General Assembly of the State of South Carolina, approved March 12, 1917, and the acts of the officers of said State, therein authorized, including the commencement
25 of this action, are in violation of and repugnant to the Fourteenth Amendment to the Constitution of the United States, in that they deprive defendant of its property without due process of law, and deny to defendant the equal protection of the laws.

(8) That the Act of the General Assembly of South Carolina, approved March 12, 1917, and the acts of the officers of said State, therein authorized, including the commencement of this action, are in violation of and repugnant to Sections 5 and 8 of the Constitution of South Carolina, Article I, in that they deprive defendant of its property without due process of law, deny to defendant the equal

protection of the laws and impair the obligation of defendant' tract with the State of South Carolina made by the deeds to d ant and its predecessors under the Acts of the General Assem South Carolina, set forth in the complaint.

(9) That it appears upon the face of the complaint herei the conditions alleged to be attached to the conveyances to defe herein and provided for in the Acts of the General Assem South Carolina authorizing the said conveyances, are conditio pugnant to and in absolute derogation of the estate granted b conveyances, and are, therefore, null, void and of no effect.

WM. ELLIOTT,
J. B. S. LYLES,
Attorneys for Defenda

Columbia, S. C., December 29, 1917.

I hereby certify that this demurrer is meritorious and not int merely for delay.

WM. ELLIOTT,
J. B. S. LYLES,
Counsel Filing Demurrer for and on Behalf of Defenda

Columbia, S. C., December 29, 1917.

26 On December 29, 1917, defendant duly served and file following petition, which was duly verified by E. W. Ro son, President of Defendant:

Petition for Removal.

Now comes defendant above named and files this petition fo removal of this case into the District Court of the United State the Eastern District of South Carolina, and files herewith its as required by law, and, as grounds for removal, avers:

That your petitioner is a citizen of the United States and of State of South Carolina, and is a corporation organized under laws of the State of South Carolina. That this suit was commen by service of a summons and complaint on December 11, 1917, is now pending in this court. That this is a suit of a civil natur common law or in equity, brought by Thomas H. Peeples, Atto General of the State of South Carolina, in the name of said State virtue of and under the authority of an Act of the General Assem of the State of South Carolina, approved March 12, 1917, refe to and incorporated in the said complaint, and in this suit the S of South Carolina seeks to recover the possession of certain prope located in Richland County, and spoken of as the Columbia Ca which is more fully described in such complaint. That the c plaint prays judgment for the possession of said premises know the Columbia Canal, and more fully described in the complaint, the income or rentals that the defendant has received therefrom s

the 20th day of August, 1917, and in this suit the State of South Carolina seeks to recover such Columbia Canal and said rentals or income. That the value of said Columbia Canal, and of the possession thereof on December 11, 1917, and now, exceeds three thousand dollars, and the value of said income or rentals sought to be
27 recovered by this complaint exceeded three thousand dollars on December 11, 1917, and the matter in controversy in this suit, exclusive of interest and costs on December 11, 1917, and now exceeds the sum or value of three thousand dollars.

That this suit arises under the Constitution of the United States in the following manner:

That prior to December 24, 1887, the State of South Carolina was the owner of the Columbia Canal, the same being then vested in and under the control of an agency of said State known as the Board of Directors of the South Carolina Penitentiary. That by an Act of the General Assembly of the State of South Carolina, approved December 24, 1887, and more fully referred to and set forth in paragraph two of the complaint, the Board of Directors of the South Carolina Penitentiary were required to convey said Columbia Canal to a body politic and corporate, created by said Act of 1887, and known as the Board of Trustees of the Columbia Canal, and such conveyance was duly made in February, 1888, as set forth in paragraph four of the complaint.

That the Board of Trustees of the Columbia Canal were authorized by said Act of December 24, 1887, as amended by an Act of the General Assembly of South Carolina, approved December 24, 1890, to sell said Columbia Canal, subject to such duties and liabilities as were imposed by said Act of December 24, 1887, as will more fully appear from paragraph four of the complaint, and such sale was duly made to the Columbia Water Power Company on January 20, 1892, in good faith, by proper deed and for valuable consideration, as more fully appears from paragraph seven of the complaint. That thereafter, on July 1, 1905, the Columbia Water Company conveyed said property to this defendant by proper deed, for valuable consideration and in good faith, as will more fully appear by paragraph eight of said complaint. That defendant has since continued
28 in peaceable possession of said property under and by virtue of its titles so acquired and contract so made with the State of South Carolina, up to the time hereafter specified.

That on the 12th day of March, 1917, the General Assembly of the State of South Carolina passed an Act which is more fully referred to, and set forth in paragraph eleven of the complaint, whereby it undertook to determine, by its own fiat, that defendant had forfeited its property rights in and to said Columbia Canal by reason of certain alleged violations of conditions or reservations alleged to have been contained in said Act of December 24, 1887, and whereby certain officers of the State were ordered and required to confiscate the property of the defendant, without proceeding in the manner required by due process of law, and guaranteed to defendant by the Fourteenth Amendment to the Constitution of the United States,

and in impairment of the obligation of defendant's contract with the State of South Carolina made by the Acts and deeds above referred to, and in violation of Section 10 of Article I of the Constitution of the United States.

That said Act of the General Assembly of South Carolina, approved the 12th day of March, 1917, is null and void, because repugnant to Section 10 of Article I and the Fourteenth Amendment of the Constitution of the United States, and all of the acts and doings of said officers of the State of South Carolina, including the service of the summons in this case and the prosecution of the same, are likewise in violation of the rights guaranteed to defendant under such sections of the Constitution of the United States. That said Act of 1917 and all acts and doings of the officers of said State of South Carolina thereunder are part and parcel of an effort to confiscate the property of this defendant and impair the obligation of its contract with said State in violation of the Constitution of the United States.

29 Wherefore your petitioner respectfully prays that this petition and the bond filed herewith be approved by this court, and that this court do order its clerk forthwith to transmit a certified copy of the record in this case to the District Court of the United States for the Eastern District of South Carolina, and that this court take no further account in this case.

And your petitioner will ever pray.

WM. ELLIOTT,
J. B. S. LYLES,
Attorneys for Defendant.

On December 29, 1917, defendant also duly served and filed its bond on removal. This bond was in the sum of $250.00, with American Surety Company of New York as surety, and was conditioned as required by and fully complied with the federal statute governing such bonds. On December 29, 1917, defendant also duly served and filed its notice to plaintiff that it was filing on that day, in the office of the Clerk of Court of Common Pleas for Richland County, its petition for the removal of the case into the Federal Court, together with its bond, as required by law; and that on the 12th of January, 1918, it would apply to the Honorable R. W. Memminger, Presiding Judge, for an order approving the petition and bond, and requiring the clerk forthwith to transmit a certified copy of the record to the Federal Court, and for the State Court to take no further account in the case. The motion was duly heard by Judge Memminger, who took the same under consideration, after arguments on both sides, and on January 17, 1918, filed the following

Order Refusing Petition for Removal.

The ground of removal sought in this case is that under Section 24 of the Federal Judiciary Act of 1911 and Section 28 thereof, it arises under the Constitution of the United States.

The question before the court is whether it shall accept the bond and order the case removed. This depends on whether or not the complaint shows a case for removal.

It does not.

The complaint does state that defendant refused to deliver the property; claiming that the State statute, under which the action is brought, is against the impairing obligation of contracts and the due process of law provisions of the Constitution of the United States.

The plaintiff does not make its claim under the Constitution of the United States; and the statement of an anticipated defense whereby a federal question may be raised, cannot be considered as a ground for removal without ignoring the very recent case of Taylor vs. Anderson, 234 U. S., 74; the syllabus of which is:

"Whether a case begun in a District Court is one arising under the Constitution or a law or treaty of the United States in the sense of the jurisdictional statute (Judicial Code No. 24), must be determined from what necessarily appears in the plaintiff's statement of his own claim in the declaration unaided by anything alleged in anticipation or avoidance of defenses which may be interposed by defendant."

The essential elements of plaintiff's claim, as shown by an inspection of the complaint, tested by this rule, do not show a case coming within the original jurisdiction of the United States Court; and consequently removable. The defendant may raise the constitutionality of the State statute, or not. If it raises it the State Courts will pass upon it, and it can go thence to the Supreme Court of the United States, which is the usual course. "When Federal questions arise in cases pending in the State Courts, those courts are competent, and it is their duty to decide them. If errors supervene the remedy by writ of error is open to the party aggrieved." Arkansas vs. Kansas & Texas Coal Co., 183 U. S., 190.

In a doubtful case it would, no doubt, be well to order removal and give the Federal Court the opportunity to remand if it saw fit. This case is not a doubtful one. No doubt the controversy will be ultimately decided by the highest Federal authority. The writ of error from the State Supreme Court is as adequate and quick a remedy as any other. The books are full of cases which go up in that way. This case presents no reason for exception. I feel sure the District Court would remand it if I sent it there.

This Court heard this matter in the thick of the work of its criminal side; but upon very able and comprehensive argument. It has no time to write out an elaborate decision, but is absolutely satisfied with its conclusion.

This Court, therefore, must deny the petition, refuse to accept the bond, or to direct the record to be removed, on the ground that no Federal question is asserted under the Constitution of the United States by the plaintiff in its complaint.

And it is so ordered.

[SEAL.] R. W. MEMMINGER,
Circuit Judge Presiding in 5th Circuit.

Columbia, S. C., January 17, 1918.

A duly certified copy of the record was filed in the Federal Court on January 23, 1918.

On January 26, 1918, defendant served upon plaintiff a notice that a certified copy of the record had been filed in the District Court of the United States for the Eastern District of South Carolina on January 23, 1918, and that defendant respectfully protested against any further proceedings being taken in the Court of
32 Common Pleas for Richland County, upon the ground that the jurisdiction of such Court had entirely ceased. This notice further stated that defendant reserved the right to except to and ask the reversal of the order of Judge Memminger, refusing defendant's motion to accept its petition and bond for removal, upon any appeal that defendant might later be required to take.

On January 30, 1918, the plaintiff duly served upon defendant its notice of motion to be made in the District Court of the United States for the Eastern District of South Carolina to remand the case to the Court of Common Pleas for Richland County:

THE UNITED STATES OF AMERICA:

In the District Court for the Eastern District of the State of South Carolina.

THE STATE OF SOUTH CAROLINA, Plaintiff,

VS.

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, a Corporation Created by and under the Laws of the State of South Carolina, Defendant.

Motion to Remand to State Court.

Now comes The State of South Carolina, plaintiff in the above entitled action, and respectfully represents to the Court that the above entitled case, which has been attempted to be removed to this Court, should be remanded, because of want of jurisdiction, in that the complaint, the only pleading herein by the plaintiff, does
33 not show a Federal question arising out of its claim or demands; that it has not asserted any claim, cause of action or demand under the Constitution of the United States, or under

any treaty or any statute made and passed by the Congress of the said United States.

This plaintiff further respectfully representing to the Court and still insisting that the only pleading in the record filed by the defendant herein that can be used to determine whether this Court has jurisdiction, refers to the petition for removal, and

(*a*) denies that it discloses any Federal question which would give this Court jurisdiction upon removal;

(*b*) that all averments contained in the said petition, that the officers of the State, appointed under the Act of March 12, 1917, were ordered and required to confiscate the property of defendant, are, as matter of fact, without foundation, and especially the statement in the said petition contained, to wit: "That said Act of 1917 and all acts and doings of the officers of said State of South Carolina thereunder are part and parcel of an effort to confiscate the property of this defendant and impair the obligation of its contract with said State in violation of the Constitution of the United States," is without foundation of fact.

If such statement is intended to be made as a ground for the removal and to give this Court jurisdiction, this plaintiff respectfully submits that the same is insufficient in point of law, for the reason that the decisions of the Supreme Court of the United States have settled the law, that the Federal Courts cannot and will not investigate the motive of a State legislature in passing a statute; the record clearly shows that the officers selected by the General Assembly of the State of South Carolina have only undertaken to do what such law provides, and all of the acts of said officers, of said State, have been in strict accord with the provisions of said Act; hence,
34 there is no Federal question, under the Constitution of the United States, raised by said statement or averment in said petition for removal.

Wherefore, it appearing upon the proper record to be considered that this, The District Court of the United States for the Eastern District of South Carolina, is without jurisdiction to hear and to determine the above entitled cause, the plaintiff moves the Court to remand the said above entitled cause to the Court of Common Pleas for Richland County, in the State of South Carolina, from whence it came, and was attempted to be removed, for further proceedings in accordance with the practice and laws of said State.

(Signed) THOS. H. PEEPLES,
Attorney General of South Carolina.

Jan. 29th, 1918.

Personally appeared before me Thos. H. Peeples, who, being duly sworn, deposes and says: That he is the Attorney General of the State of South Carolina, and one of the officers appointed by the Act of the General Assembly of said State, to carry out the provisions of the Act approved March 12th, 1917, mentioned in the complaint

and the petition for removal; and, that the statement of fact set out in the above motion to remand, is true of his own knowledge.

Said motion was duly heard by the Honorable Henry A. M. Smith, United States District Judge, by agreement between the parties, on February 11, 1918, when he entered the following

Order Remanding the Case.

This matter came on to be heard upon a motion to remand. Counsel on both sides have appeared and been heard. The
35 cause was originally instituted in the Court of Common Pleas for the County of Richland, State of South Carolina, and was then sought to be removed by the defendant by a petition for removal, and bond filed within due time, and the record has within the time prescribed by statute been filed in this Court. Upon consideration of the complaint herein, it appears to the Court that it does not appear upon the face of the complaint that this proceeding has been brought to assert, enforce or recover upon any right given or directly arising under any statute or constitutional provision of the United States; nor does it appear therefrom that the right sought to be enforced by the plaintiff is one which is necessarily in any way prohibited by any statute or constitutional provision of the United States. The only reasonable construction that appears to the Court that should be given to the complaint is that it is brought to determine whether or not there has been any failure on the part of the defendant to perform the contract referred to in the complaint, so as to render it null and void as against the plaintiff. There is a statement in the Statute of South Carolina of 1917, that the defendant had not complied with the terms of the contract and that the property the recovery of which is sought in this proceeding had been by reason of such failure, forfeited, and had reverted to the State. Inasmuch as whether or not a compliance had been had with the contract, is a judicial and not a legislative function, it appears to the Court that the proper construction of this section of the statute is that it is only a legislative declaration that in the opinion of the legislature that such was the case, and that such being the case, in its opinion, the subsequent legislative provisions of the statute were thereon predicated. It cannot reasonably be held that the legislature intended to usurp the functions of the Court, and without hearing and without examination and without the other party in interest being properly before the Court undertook
36 to arrive at a final judicial conclusion of fact. The present proceeding, therefore, is a proceeding brought upon the theory that the legislature being of the opinion that by reason of the failure of the defendant to properly comply with the contract the right to the property had reverted to the State; therefore it should be so judicially ascertained and determined and a judgment in favor of the State made. Such a proceeding raises no Federal question. This Court cannot assume in advance that the State Court would hereafter create a Federal question by any decision made in contravention of any law or constitutional provision of the

nited States. Should, however, such be the case, and the State ourt hereafter decide that the legislative declaration had the force a judicial finding and that the defendant was bound thereby, and ot entitled to be heard upon the question whether or not it had tually failed to perform its contract, then a Federal question might ise, and the defendant would have full relief by ultimate appeal the Supreme Court of the United States. This Court will not sume that any such Federal question will be created by any future cision of the State Court, and no Federal question, therefore, pearing upon the face of the complaint, it is:

Ordered, That this proceeding be, and the same is hereby, re anded to the Court of Common Pleas for Richland County.

HENRY A. M. SMITH,
U. S. District Judge.

11th February, 1918.

This order was duly filed in the Federal Court on February 11, 918, and certified copies then mailed to the attorneys of record for th sides.

Thereafter, the demurrer was set down for argument by his Honor, Judge Townsend, at the June term of the Court of Common Pleas for Richland County, 1918, and the argument took place before him on June 26th and June 27th. Upon e conclusion of the argument, his Honor took the matter under nsideration, and on the 29th of June, 1918, the same date and fore the term of court was adjourned sine die, signed and filed the llowing

Order Overruling Demurrer.

This cause comes on to be heard on demurrer to complaint, on ground that it fails to state facts sufficient to constitute a cause of ion. The first question is, whether there is any condition in the nt by the State of the Columbia Canal working a forfeiture, be se of non-compliance by the grantee therewith.

A grant by "an Act of the legislature * * * differs from a nt by a private person in that it is both a grant and a law; and, such, the intent of the law is to be kept in view, and its purpose ectuated, whenever, the subject matter of the grant comes into con versy; and that construction must be placed upon it which will serve and carry out the object of the legislature, however much h construction may conflict with the principles of the common , or prevent the attachment of equities which would spring from nsactions between private parties." Jackson &c. R. Co. vs. Da son, 65 Mich., 430; Shulenberg vs. Harriman, 21 Wall., 44; sh vs. Sullivan, 29 Minn., 214; Oregon & Cal. R. R. vs. United tes, 238 U. S., 416.

The sense of a law or terms of an instrument may be found in er words than the quoted technical ones, if the intention is made r." Oregon & Cal. R. R. Co. vs. United States, 238 U. S., 416.

A history of the Columbia Canal, as shown by our legislative Acts, r be found in the opinion in State vs. Water Power Co., 82 S. C.,

181, 183 to 187. As there suggested, the Broad and Congaree
38 Rivers are navigable streams, and while the grant was obtained by the grantee for his private advantage, it was made by the State, primarily, in pursuance of a policy to benefit the community by the improvement of the navigability of these rivers (82 S. C., 186, 187), and, therefore, to advantage to that extent, the State. The grant contemplated a development of the subject of the grant by the grantee, in a direction that would promote the purposes of commerce. White vs. Nassau Trust Co., 168 N. Y., 149, 64 L. R. A., 275. The property of the State in these rivers was engrafted with a trust for the benefit of the public, and was inalienable except for certain public purposes. State vs. Pacific Guano Co., 22 S. C., 83; Ill. Cent. R. R. Co. vs. Ill., 146 U. S., 387; Scott vs. Lattig, 227 U. S., 242, 243; U. S. vs. Cress, 243 U. S., 316.

As stated in Water Power Co. vs. Electric Co., 43 S. C., 163, by the present Chief Justice, the grant in question was made "upon the conditions therein stated." Prominent among these conditions was the improvement of the navigability of the rivers by the completion of the canal from Bull's Sluice on Broad River to a point a few yards above Rocky Branch on the Congaree. The statute which makes the grant clearly declares the purpose for which it was intended the granted property should be used, i. e., the improvement of the navigability of these rivers by the completion and maintenance of the canal as therein prescribed, which was in furtherance of the trust held by the State. Such use would inure specially to the benefit of the public for whom the State was trustee. The grant may be declared void if the declared purpose is not fulfilled. Mahoning vs. Young, 59 Fed., 96; Siegel vs. Herbine, 148 Pa., 236; 15 L. R. A., 547. The grantee cannot disregard the requirements of the law under which he received the property, and still continue to hold it. In effect, the grant was of a limited fee, made on the implied condition of reverter in the event that the grantee
39 failed, or ceased, to use property for the purpose for which it was granted. Northern Pacific Ry. vs. Townsend, 190 U. S., 267, 271.

This disposes of the first and second specifications of demurrer.

The legislative Act of 1917, coupled with the alleged demand for possession and refusal, is equivalent to the exercise of the right of re-entry. White vs. Britton, 75 S. C., 128; Schulenberg vs. Harriman, 21 Wall., 44.

A judicial proceeding was authorized by the Act of 1917.

Des Moines vs. City Railway Co., 214 U. S., 179.
Defiance Water Company vs. Defiance, 191 U. S., 184.
New Orleans Waterworks Co. vs. Louisiana, 185 U. S., 336.
City of Detroit vs. Detroit & Ry. Co., 184 U. S., 368.
Taylor vs. Anderson, 234 U. S., 74.
Hammond vs. Railway, 15 S. C., 10.

The complaint shows no waiver by the State of any breach of conditions in the grant. The other specifications of demurrer were not pressed in argument. The purpose of this action is to determine whether the alleged conditions existed in the grant, and,

whether the defendant and those under whom it claims have violated them. Both the conditions and violations are alleged. If the defendant has any defense, it must be shown by answer.

It is, therefore, ordered, adjudged and decreed, That the demurrer to the complaint be, and is hereby, overruled; with leave to the defendant to answer, if it be so advised, within twenty days from the date of this order.

W. H. TOWNSEND,
Presiding Judge.

Columbia, S. C., June 29th, 1918.

On the 6th day of July, 1918, defendant duly served upon plaintiff the following

10 *Notice of Intention to Appeal.*

To Thos. H. Peeples, Esq., Attorney General of South Carolina, B. L. Abney, Esq., and J. Fraser Lyon, Esq., Attorneys for Plaintiff:

You will please take notice that defendant intends to appeal to the Supreme Court of South Carolina from the order and decree of his Honor, W. H. Townsend, Presiding Judge, dated and filed June twenty-ninth, 1918, overruling defendant's demurrer to the complaint, and also from the order of his Honor, R. W. Memminger, Presiding Judge, dated and filed January seventeenth, 1918, refusing defendant's motion to approve and accept defendant's petition and bond for the removal of this case into the District Court of the United States for the Eastern District of South Carolina; upon exceptions to be hereafter served upon you, together with the case for appeal.

WM. ELLIOTT,
J. B. S. LYLES,
Attorneys for Defendant.

July sixth, 1918.

On the 25th day of July, 1918, defendant duly served its proposed case for appeal to the Supreme Court, together with the following

Exceptions to Order and Decree Overruling Demurrer.

1. Because, for the reasons therein stated, his Honor should have sustained the first ground of the demurrer, which was as follows:

"* * * that it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action, in that:

11 "(1) It appears upon the face of the complaint that there is no condition contained in the Acts of the General Assembly of South Carolina, approved December 24, 1887, or the amendatory Act of December 24, 1890, or in the deeds of conveyance to this defendant, or its predecessors in title and interest, or as

otherwise alleged in said complaint, the violation of which works a forfeiture and entitles plaintiff to the possession of the property in question or the rental or income thereof since August 20, 1917."

2. Because, for the reasons therein stated, his Honor should have sustained the second ground of the demurrer, which was as follows:

"* * * that it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action, in that:

"(2) That the complaint alleges no facts working a forfeiture of or entitling plaintiff to the possession of the property in question."

3. Because his Honor erred in holding that the grant to defendant and defendant's predecessor was upon an implied condition of reverter, in event that the grantee failed, or ceased, to use the property for the purpose for which it was granted. The error being that there was no such condition expressed in the Act of 1887, as amended by the Act of 1890, under the authority of which the grant was made to defendant's predecessor, and nothing from which any such condition could be implied.

4. That his Honor erred in holding that the case of Water Power Co. vs. Electric Co., 43 S. C., 163, held that the grant in question (meaning thereby the grant to defendant and its predecessor) was made "upon the conditions therein stated;" when such case in express language stated that the grant to the board of trustees of the Columbia Canal, by the board of directors of the South Carolina Penitentiary, pursuant to the Act of 1887, was "upon the
42 conditions therein stated," but that the amendatory Act of 1890 authorized said board of trustees to sell said property only "subject to all the duties and liabilities imposed by the Act of 1887."

5. That his Honor erred in holding that Section 3 of the Act of 1887, and particularly the proviso thereto, imposed the condition subsequent upon defendant that the canal should be constructed to the south side of Gervais Street and develop 10,000 horse power at such point and that a dam should be constructed sufficient to develop such power and that a failure of defendant or its predecessors to discharge these obligations forfeited the property granted. The error being that said section and said Act did not impose such conditions, either express or implied, and no forfeiture could be imposed because thereof.

6. That his Honor erred in holding that the provision of Section 5 of the Act of 1887, as amended by the Act of 1890, " That the said canal shall be opened for navigation free of charge * * *" was a condition subsequent working a forfeiture for failure of defendant and its predecessors to comply therewith. The error being that this provision was not a condition, either express or implied, for breach of which a forfeiture could be imposed.

7. That his Honor erred in holding that the provision of Section 7 of the Act of 1887, as amended by the Act of 1890, "* * * and shall, as soon as is practicable, complete the canal down to Congaree River a few yards above the mouth of Rocky Branch * * *" was a condition subsequent working a forfeiture for failure of defendant and its predecessors to comply therewith, under the allegation of paragraph 10 of the complaint, "that it has for a long time been practicable to carry out the terms of said Act and to complete the canal down to the Congaree River a few yards above the mouth of Rocky Branch." The error being that this
13 provision is not and was not a condition, either express or implied, for breach of which a forfeiture could be imposed.

8. That his Honor erred in holding that the allegations of paragraph 10 of the complaint, that defendant, and its predecessors, has to a great extent abandoned the canal for the development of water power, has not kept up the dam in proper repair and has not kept the walls of the canal in proper repair, alleged conditions subsequent for the breach of which a forfeiture could be imposed. The error being that there were no such conditions imposed by the Act of 1887, as amended by the Act of 1890, which were the source of the title of defendant and its predecessors.

9. Because, for the reasons therein stated, his Honor should have sustained the fourth ground of the demurrer, which was as follows:

"* * * that it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action, in that:

"(4) That it appears upon the face of the complaint that defendant and its predecessors have been in quiet and peaceable possession and enjoyment of the property for more than twenty years since all and any conditions found in the Acts of the General Assembly of South Carolina, approved December 24, 1887, and December 24, 1890, or in the deeds of conveyance to defendant, or of its predecessors, or otherwise alleged in said complaint, became effective or operative and such conditions have been duly complied with or duly waived by the State of South Carolina."

10. That his Honor should have held that it appeared from the face of the complaint, that the alleged conditions of the grant of the canal had been breached for a long time and that the State of South Carolina, for many years after such breach, had continued to receive the reserved horse power or rental which accrued after such breach of conditions, and by so doing had waived the right
41 to enforce any forfeiture for breach of such conditions.

11. Because, for the reasons therein stated, his Honor should have sustained the sixth ground of the demurrer, which was as follows:

"* * * that it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action, in that:

"(6) That the Act of the General Assembly of the State of South Carolina, approved March 12, 1917, and the acts of the officers of the State of South Carolina therein authorized, including the commencement of this action, are in violation of and repugnant to Section 10 of Article I of the Constitution of the United States, in that they impair the obligation of defendant's contract with the State of South Carolina made by the deeds to defendant and its predecessors under the Acts of the General Assembly of South Carolina set forth in the complaint."

12. Because, for the reasons therein stated, his Honor should have sustained the seventh ground of demurrer, which was as follows:

"* * * that it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action, in that:

"(7) That the Act of the General Assembly of the State of South Carolina, approved March 12, 1917, and the acts of the officers of said State, therein authorized, including the commencement of this action, are in violation of and repugnant to the Fourteenth Amendment to the Constitution of the United States, in that they deprive defendant of its property without due process of law and deny to defendant the equal protection of the laws."

45 13. Because, for the reasons therein stated, his Honor should have sustained the eighth ground of the demurrer, which was as follows:

"* * * that it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action, in that:

"(8) That the Act of the General Assembly of South Carolina, approved March 12, 1917, and the acts of the officers of said State, therein authorized, including the commencement of this action, are in violation of and repugnant to Sections five and eight of the Constitution of South Carolina, Article I, in that they deprive defendant of its property without due process of law, deny to defendant the equal protection of the laws and impair the obligation of defendant's contract with the State of South Carolina made by the deeds to defendant and its predecessors under the Acts of the General Assembly of South Carolina, set forth in the complaint.

14. Because his Honor should have held that the Act of 1887, as amended by the Act of 1890, and the grants to defendant and its predecessor thereunder, made a contract between the State of South Carolina and the defendant, free from any conditions working a forfeiture, in which defendant was protected by Section 10 of Article I and the Fourteenth Amendment to the Constitution of the United States; and that the Act of 1917 and the acts of the officers of the State of South Carolina therein authorized, including the alleged re-entry and the commencement of this action, impaired the obligation of said contract and denied to defendant the equal protection

of the laws and deprived defendant of its liberty and property without due process of law, in violation of said provisions of the Constitution of the United States.

46 *Exceptions to Order Refusing Petition for Removal.*

15. That his Honor erred in ruling that the complaint did not show a case which the defendant was entitled to remove to the District Court of the United States for the Eastern District of South Carolina, within Sections 24 and 28 of the Federal Judicial Code, and erred in refusing to accept defendant's petition and bond for the removal.

Whereas, his Honor should have held that the complaint alleged a contract made between the State of South Carolina and the defendant, by and under the Act of 1887, as amended by the Act of 1890, and the conveyances to defendant and its predecessor thereunder, in which defendant was protected by Section 10 of Article I and the Fourteenth Amendment to the Constitution of the United States, and also alleged the Act of 1917 and the actions of the officers of the State of South Carolina thereunder, and that these allegations necessarily showed that said Act of 1917, and the actions of said State officers thereunder, impaired the obligation of defendant's contract and denied to defendant the equal protection of the laws and deprived defendant of its liberty and property without due process of law, in violation of said provisions of the Constitution of the United States; and his Honor should have held that defendant had fully complied with Section 29 of said Federal Judicial Code and was entitled to remove said suit.

47 & 48 *Stipulation.*

We agree that the foregoing shall constitute the "Case" in compliance with the rules of the Supreme Court of South Carolina & Return.

(Sd.)
(Sd.) WM. ELLIOTT,
J. B. S. LYLES,
(Sd.) *Attorneys for Appellant.*
B. L. ABNEY,
Attorneys for Respondent.

Columbia, S. C., Aug. 27, 1918.

49 STATE OF SOUTH CAROLINA:

In the Supreme Court, October Term, 1920.

THE STATE OF SOUTH CAROLINA, Respondent,

against

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, a Corporation Created by and under the Laws of South Carolina, Appellant.

Appeal from Richland County Common Pleas.

Honorable W. H. Townsend, Circuit Judge.

Second Appeal

Notice.

To Samuel M. Wolfe, Esqr., Attorney G neral; J. Fraser Lyon, Esqr., Attorneys for Respondent:

You will please take notice that on Tuesday morning, April 12th, 1921, at ten o'clock *a. m.*, or as soon thereafter as counsel can be heard, the appellant will move the Supreme Court to have the Chief Justice call to the assistance of the Supreme Court all of the Judges of the Circuit Court to hear and determine the appeal in this cause, as provided in Section 12 of Article V of the Constitution, upon the following grounds:

1. Because there is no "entire Court" to decide the questions of constitutional law involved in the cause.

2. Because the cause involves grave questions of public concern.

WM. ELLIOT,
R. B. HERBERT,
W. C. McLAIN,
J. B. S. LYLES,
Attorneys for Appellant.

April 7th, 1921.

Service acknowledged this 8th day of April, 1921.

S. M. WOLFE,
Attorney General.

50 STATE OF SOUTH CAROLINA:

In the Supreme Court, October Term, 1920.

THE STATE OF SOUTH CAROLINA, Respondent,

against

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, a Corporation Created by and under the Laws of South Carolina, Appellant.

Appeal from Richland County Common Pleas.

Honorable W. H. Townsend, Circuit Judge.

Second Appeal.

Case.

Wm. Elliott,
J. B. S. Lyles,
R. B. Herbert,
W. C. McLain,
Attorneys for Appellant:

Samuel M. Wolfe,
Attorney General:

B. L. Abney,
J. Fraser Lyon,
Attorneys for Respondent.

51 *Statement.*

This action is brought in the name of the State of South Carolina by the State officers constituting the Canal Commission, by virtue of the authority, directions and declaration of foreiture contained in the Act of 1917 (30 Stat., 348), to recover possession of the property known as the Columbia Canal, together with damages for defendant's withholding of same, because of the failure and neglect of the Columbia Water Power Company and its assignee, the defendant, to fulfill the conditions contained in the Acts of 1887 and 1890 (19 Stat., 1090-1097, 20 Stat., 967), and conveyances thereunder.

Suit was commenced by service of a summons and complaint December 11, 1917.

The defendant duly filed its petition and bond for removal of the case to the District Court of the United States for the Eastern District of South Carolina upon the ground that the suit arose under the Constitution of the United States, but the State Court refused to accept the petition and bond for removal and the Federal Court remanded the case upon the ground that no Federal question appeared from the necessary allegations of the complaint.

The defendant demurred to the complaint upon the grounds, chiefly, that the complaint failed to state a cause of action, because

(*a*) there was no condition contained in the Acts of the General Assembly of South Carolina, or in the deeds of conveyance to this defendant or its predecessors in title and interest, or as otherwise alleged in said complaint, the violation of which works a forfeiture; and (*b*) that the Act of 1917 violated both State and Federal Constitutions. This demurrer was overruled on Circuit. These questions were then brought up to this Court on an interlocutory appeal, but were all decided against defendant. See 112 S. C., 528; 100 S. E., 355, filed August 26, 1919.

52 Thereupon, defendant answered and the cause came on for trial before Circuit Judge Townsend, and a jury, at the June term, 1920.

The trial commenced June 28th, and the verdict was rendered July 6th, at 7:26 p. m., consuming eight days.

The Court directed the jury to find a verdict for the plaintiff for the property in dispute, but submitted the issue of damages for withholding of the property by defendant as shown by his charge hereinafter referred to, and the jury found a verdict of "no damage."

This appeal is taken from the judgment for possession of the property in dispute duly entered on the verdict by plaintiff.

Questions Raised.

The record presents to this Court the following general questions:

1. Does the Act of 1917 violate the Federal Constitution?

2. Should the Court below have directed a verdict in defendant's favor?

3. Did the Court below err in directing a verdict in plaintiff's favor for the property in dispute?

Issues Made by Pleadings.

Summary of Complaint and Answer.

Paragraph 1 of complaint alleges that on and before December 24, 1887, the State was seized in fee and possessed of the property known as the Columbia Canal—from its source, at Bull's Sluice, on Broad River, through its whole length to where it empties into the Congaree River at or near Rocky Branch, "together with the lands now held therewith, acquired under the Acts of the General Assembly of this State, or otherwise, and all and singular the

53 rights, members and appurtenances thereto belonging, together with all easements, rights of way and rights of overflow."

Paragraph 1 of answer: Admits, but denies that all lands, easements, rights, etc., now held by defendant were ever owned by the State, and alleges that much and many were acquired by defendant and its predecessors in title subsequent to December 24, 1887, and

subsequent to the deed from the Canal Trustees to Columbia Water Power Company, on January 20, 1892.

Paragraph 2 of complaint quotes Sections 1, 2, 3, 4, 5, 6, 7, refers to Sections 8-18 and quotes from Section 19 and refers to Sections 20 and 21 of the Acts of 1887 (19 Stat., 1090).

Paragraph 2 of answer admits these allegations.

Paragraph 3 of complaint refers to the second Act of 1887 (19 Stat., 1097), authorizing the city of Columbia to guarantee the coupons on the Canal Bonds, and alleges that the election was held and resulted in favor of the guarantee.

Paragraph 3 of answer admits these allegations.

Paragraph 4 of complaint alleges that, pursuant to the Act of 1887, the Board of Directors of the Penitentiary, after the city of Columbia had complied with the second Act of 1887 and voted to guarantee the bond coupons, executed their deed to the Board of Trustees of the Columbia Canal on February 1, 1888 (see Exhibit 1—Appendix); and alleges that the Trustees immediately took possession and commenced the development of the property for water power and for navigation.

Paragraph 4 of answer admits the execution of the deed, but demands its production; admits that the Trustees took possession of the canal and commenced the development thereof for water power purposes, but denies the other allegations of paragraph 4.

51 Paragraph 5 of complaint alleges the Act of 1890 (20 Stat., 967), amending Sections 3 and 23 of the Act of 1887, diminishing the dimensions of the canal south of Gervais street and authorizing the Trustees to sell same to any person or corporation, subject, however, to all of the duties and liabilities imposed by the Acts of 1877 and 1890, and subject to all contracts, liabilities and obligations entered into by the Board of Trustees of the Columbia Canal prior to such sale and transfer.

Paragraph 5 of answer admits the Act of 1890 and the Act of 1887.

Paragraph 6 of complaint alleges that the Columbia Electric Street Railway, Light and Power Company was chartered by the Act of 1891 (20 Stat., 1153), and in May, 1911, its name changed, under the laws of this State to Columbia Railway, Gas and Electric Company—and is the defendant.

Paragraph 6 of answer admits these allegations.

Paragraph 7 of complaint alleges that the Trustees continued in possession of the property, under the Acts alleged, until January 20, 1892, when, by the authority of Section 23 of the Act of 1887, as amended, they conveyed the same by deed dated January 11, 1892, but not consented to by the Mayor and nine Aldermen of Columbia until January 20, 1892, to the Columbia Water Power Company, a corporation of South Carolina; and then quotes the description of the property and the habendum clause from the deed, "subject, nevertheless, to the conditions, limitations, provisos and exceptions set forth and prescribed in the Acts of the General Assembly of South Carolina heretofore mentioned." See Exhibit 5—Appendix.

Paragraph 7 of answer admits execution of deed and craves reference thereto.

55 Paragraph 8 of complaint alleges that the Columbia Water Power Company took possession of said canal, under said Acts and said conveyances, and proceeded to utilize and use the same in accordance with the terms and provisions of said Acts, and to construct a power house and to sell power generated from the canal to manufacturing interests in and around Columbia, and to keep open for navigation, free of charge, said canal, down to Gervais street, as prescribed by Section 5 of the Act of 1887; that on July 1, 1905, it conveyed the said property to defendant (under its former name) and made and executed its deed of conveyance, whereby it granted, bargained, sold and released, among other things, the following property (here quoting the description from the deed. See Exhibit 6—Appendix). The said deed of conveyance contained the following provisions: "Subject, however, to the conditions, limitations, provisos and exceptions set forth and declared in the said deed of conveyance."

The said property being the same described in the first aforementioned Act, with improvements thereafter made and easements, rights of way and rights of overflow thereafter acquired by purchase or condemnation by the Columbia Water Power Company in pursuance of the powers contained in the aforesaid Act of 1887. And, that the defendant herein took possession and control of said property and retains such possession and control to the present time.

Paragraph 8 of answer: In answer to paragraph eight, upon information and belief, defendant admits that the Columbia Water Power Company took possession of said canal and constructed a power house to sell power generated by water from the canal, and proceeded to utilize and use the same for water power purposes; and it further admits that on the first day of July, 1905, it executed a deed of said property to the defendant, under its prior corporate name,

56 but it denies that said deed is fully set forth in said paragraph, and demands the production thereof in proof of its contents. It admits that the property conveyed by said deed was the same described in the first aforementioned Act, with improvements thereafter made, and easements and rights of way and rights of overflow thereafter acquired by purchase or condemnation by the Columbia Water Power Company, and admits that defendant took possession and control of such property and retains such possession and control to the present time.

Except as herein specifically admitted, defendant, upon information and belief, denies the allegations of paragraph eight.

Paragraph 9 of complaint refers to and quotes from Sections 1 and 3 of the Act of 1887, and then proceeds:

That with regard to the provisions hereinabove set forth of said Act of 1887, the plaintiff alleges and informs the Court that neither the Board of Trustees of the Columbia Canal nor its assignees or its conveyees, the Columbia Water Power Company, or the defendant, has ever proceeded any further with the construction of the canal than the north side of Gervais street, and has not developed the 10,000 horse power on the south side of Gervais street, as was required, and was one of the conditions upon which the said Act was

passed. That the said canal has been, by the Board of Trustees, carried as far as its present southern terminus, to the north side of Gervais street and no further, and the plaintiff is informed and believes that the said 10,000 horse power required at the south side of Gervais street has never been developed or complied with, nor any dam constructed or raised sufficient to develop such power.

By Section 5 of said Act, it is one of the conditions and limitations prescribed therein, "That the said canal shall be opened for
57 navigation free of charge by the said Board of Trustees, the State reserving the right to make such improvements in the canal as may be necessary to promote navigation through the canal more rapidly than can be accomplished by the Board under this Act: Provided, The said Board of Trustees or lessees of the water power are indemnified against any damage arising therefrom." And, the plaintiff alleges that such condition has never been complied with, but, on the contrary, the said defendant, formerly known as the Columbia Electric Street Railway, Light and Power Company, allowed the locks at the northern entrance of the canal to become so out of repair that it has never been used, and prior to the passage of the Act hereinafter mentioned, could not be used for navigation; that for lack of repairs, it has permitted it to fall into decay, as well as its water gates to be choked, to become unworkable and filled up with mud; that it has placed obstructions at the entrance of said locks from the canal into the Broad River, and vice versa, so that the same can not now be at all used for any kind of navigation; that it has allowed and permitted the city of Columbia, contrary to its duty and its obligations, and in violation of the conditions upon which the said property was conveyed by the State, through the Board of Directors of the Penitentiary to the Board of Trustees, to place water pipes, mains and bridges across the canal at the city waterworks, which effectually bar and obstruct the navigation for any kind of craft from proceeding further; that it has also permitted and allowed the Columbia Mills, a corporation then known as the Columbia Mills Company, to construct a bridge opposite its mill across the canal, whose height is such as not to permit the passage of any craft of any kind which might desire to use the waters in the canal, either for carrying freight or for boats of pleasure.

Paragraph 9 of answer: In answer to paragraph nine, defendant admits so much thereof as quotes Sections One, Three and
58 Five of said Act of 1887, but denies that said Act is fully quoted in said paragraph and demands reference thereto in proof of its terms.

Defendant admits that the city of Columbia placed water pipes or mains across the canal at the city waterworks, but defendant alleges that the Supreme Court of South Carolina has heretofore ordered the removal of such water pipes by its judgment duly filed. Defendant admits that the Columbia Mills constructed a bridge across the canal opposite its mill, but denies that same obstructs navigation in violation of said Act of 1887.

Upon information and belief, defendant denies each and every

allegation in said paragraph nine except as hereinbefore specifically admitted.

Paragraph 10 of complaint quotes from Section 7 of the Act of 1887 and proceeds:

That one of the main and principal inducements moving the State of South Carolina to direct a conveyance of said property to the Board of Trustees was for the purpose of making more navigable the Columbia Canal, which had existed for many years prior thereto, and which it had under construction, so that the waters of the same might make connection with the waters of the Congaree River and thereby pass around the shoals in the Congaree and Broad rivers and keep a continuous line of communication navigable for boats on the Broad River as well as on the Congaree River, and to bring the commerce which could be carried on said rivers up to and within the city limits of the city of Columbia; but, notwithstanding such conditions and limitations declared by said Act with regard thereto, neither the Columbia Water Power Company nor the defendant has in any way attempted to dig and construct the canal from the north side of Gervais street down to Rocky Branch, a distance of about a mile and a half, where it enters into the Congaree
59 River, either for the purpose of navigation or for the development of power, nor have the said parties complied with the conditions to keep the canal open for navigation free of charge even to the north of Gervais street, but has practically prevented, in various ways, boats or smaller craft from using the waters of the canal either for business or for pleasure, and the defendant has, by allowing mud to accumulate, to make impassable certain places in the canal, which practically destroys every feature of navigation, and has to a great extend abandoned the canal for the development of water power, to the great injury and damage to the citizens of the State and to the great damage and injury to the property so conveyed to it, to the use and purposes for which it was originally constructed and designed to be enlarged and developed, and for which it was conveyed to the parties aforesaid. That it has not kept up in proper repair its dam at the head of the canal, but has allowed the bents in the same to become washed out and the riprapping upon the walls of the canal to become in such bad repair that any large freshet in the river may wash the same away and probably destroy the greater portion of the entire canal property.

The Attorney General, for and in behalf of the State of South Carolina, alleges and informs the Court that it is greatly to the interest of the State and its citizens that the said canal should be constructed as designed and as contemplated in said Act for navigation throughout its entire length, and that the conditions upon which said canal was conveyed by the Board of Directors of the Penitentiary to the Board of Trustees have been violated by the defendant; and that it has for a long time been practicable to carry out the terms of said Act and to complete the canal down to the Congaree River a few yards above the mouth of Rocky Branch; but notwithstanding this, the defendant fails and refuses to perform its contract
60 and obligation in that behalf undertaken.

Paragraph 10 of answer: In answer to paragraph ten, defendant admits that Section Seven of the Act of 1887 is quoted therein, but denies that the whole Act is set forth in said paragraph, and demands reference to same in proof of its terms.

It admits that the canal has not been constructed from Gervais street down to Congaree River a few yards above the mouth of Rocky Branch, but it denies that it has been practicable so to do, and alleges with reference thereto that no demand has ever been made upon the defendant by the State of South Carolina for such extension or completion of the Columbia Canal, and further alleges that the requirements of said Act as to the extension of said canal to said Congaree River as aforesaid is indefinite as to the time within which the same must have been done, and that in the absence of any demand from said State of South Carolina no obligation had vested on defendant to make such extension. Defendant further alleges that the opinion and judgment of the Supreme Court of South Carolina, rendered on the appeal from the order of the Circuit Court overruling the demurrer in this cause, and filed on August 26, 1919, was the first adjudication that defendant was under a legal obligation to extend said canal down to Congaree River a few yards above the mouth of Rocky Branch, and defendant alleges that the remittitur sending down such opinion and judgment of the Supreme Court was filed in the Circuit Court on September 6, 1919, and that soon thereafter, to wit, on September 18, 1919, defendant duly made an offer to the State of South Carolina, through its duly authorized officers, to extend and complete said canal down to Congaree River a few yards above the mouth of Rocky Branch, according to
61 the terms of the Act of December 24, 1887, and Acts amendatory thereof.

Upon information and belief, defendant denies each and every allegation contained in said paragraph ten not hereinbefore specifically admitted.

Paragraph 11 of complaint: That the General Assembly of South Carolina by an Act entitled (quoting title of Act of 1917, 30 Stat., 318), did find that the Board of Trustees of the Columbia Canal, or its assigns, to wit: The Columbia Water Power Company, and the defendant failed and neglected to fulfill the conditions in said Act set forth and refused to perform the said conditions and had further neglected to keep in proper repair and open for navigation the said canal and remove the damage and injury that was being committed to the property so authorized to be transferred by the General Assembly of the State of South Carolina, under the aforesaid Act; and then quoted Sections 1 and 2 of said Act.

Paragraph 11 of answer admits the Act of 1917 and craves reference to the entire Act.

Paragraph 12 of complaint: The Attorney General, for and in behalf of the State, further informs the Court that in pursuance of such authority, it did notify the defendant, through its proper officers, its president and general manager, that they were ready and willing to enter into satisfactory arrangements with them with regard to said canal; that the said defendant, through its proper officers,

failed and declined to make any satisfactory arrangements with them within the time limited and stated in said Act.

This paragraph then quotes Section 3 of the Act of 1917 and proceeds: That the Attorney General of the State of South Carolina, Honorable Thomas H. Peeples; the Chairman of the Judiciary Committee of the Senate, Honorable Huger Sinkler; the Chairman of the Judiciary Committee of the House of Representatives,
62 Honorable Jesse W. Boyd; the Chairman of the Finance Committee of the Senate, Honorable Niels Christensen, and the Chairman of the Ways and Means Committee of the House of Representatives, Honorable J. T. Liles, being the officers designated by said statute to make re-entry upon said property, did, on the 10th day of August, 1917, duly give notice to Columbia Railway, Gas and Electric Company, through its president, Edwin Wales Robertson, and its general manager, A. L. Kenyon, that it had failed to make satisfactory arrangements with regard to the said canal, and made demand upon the defendant, the Columbia Railway, Gas and Electric Company, and its president, Edwin Wales Robertson, and its general manager, A. L. Kenyon, for the possession and control of said property set forth and described in said Act, and did further give notice that they would, upon the 20th day of August, 1917, at twelve o'clock noon, make re-entry upon and in behalf of the State and take possession and control of said property; and, that the said company, its agents and servants, from thence on should cease to take or have any management or control of said property, and to surrender the possession of same peacefully and in a proper manner to the said State officers, chargeable with the management, control and direction and development of the water power, and for carrying out the completion of the canal for navigable purposes, as contemplated by the aforesaid Acts, and dispose of the same in such way as they may deem advisable and proper for the interest of the State. And further notified the said defendant, and its officers above mentioned, its agents and employees, that any attempt upon their part to interfere with, impede, obstruct, the possession, control and management of said property as authorized by provisions of the Act approved March 12, 1917, or in any manner trespass upon said property after the re-entry made by them, mentioned in said
63 notice would be considered and treated as a trespass.

That the said Columbia Railway, Gas and Electric Company, by William Elliott and J. B. S. Lyles, its attorneys, did acknowledge receipt of their notice and deny in toto the claims of the Commission concerning the Columbia Canal, and further warned and notified each of them to refrain from interfering with or trespassing upon its possession, management or control of the Columbia Canal, and its appurtenances, and notified them that it would hold each of them personally and individually responsible for any interference with or trespass committed upon its property or possession. And further advised them that said Act of 1917, to which the said Attorney General and other officers of the State referred, and under which they claim authority, is null and void because it violates the Constitution of the United States and of South Carolina.

That thereupon the said Attorney General and the other members of the Committee set forth in the said Act, notified the said Columbia Railway, Gas and Electric Company, through its attorneys, that they claimed possession and control of the said property described in the said Act and in said letter of August 10th addressed to them, and for and in behalf of the State of South Carolina claimed possession and control of said property from and after twelve (12) o'clock noon of the present day (August 20, 1917), and that the reentry mentioned in paragraph 2 of said Act had by reason of the notice heretofore served upon it and its reply thereto, had performed the direction of said Act in such way as was proper under the circumstances; and, that the State of South Carolina, by and through them, in its behalf, claim the possession and control of said property, its development and disposal in accordance with the terms and provisions of said Act.

64 That the Attorney General, and the said officers mentioned in paragraph 2 of said Act, upon consideration, do not conceive that it was appropriate and proper for them, as representatives of the State of South Carolina, to commit a breach of the peace in making forcible entry upon said property and taking possession thereof; that, therefore, by virtue of the provisions of paragraph 3 of said Act, this action is instituted by the Attorney General to recover possession of the said property, as hereinabove described, and in said Acts mentioned, which the defendant is now in the unlawful possession thereof and withholding the same from the said State.

That the plaintiff is entitled to damages for the withholding of the same by the defendant from the 20th day of August, 1917, in such amount as the defendant has received, or should have received, from the use of the water power since that time, up to the bringing of this action. That this action is brought only for the above purposes and not for such damages as the State of South Carolina has suffered by reason of the failure of the Board of Trustees of said property, and its assignees or conveyees, to perform the conditions contained in said Acts hereinabove mentioned, and in the several conveyances thereto made to them from the said Board of Trustees, and enjoined and provided for in said Acts, or for any damages which may have arisen to the State by reason of the unlawful conduct, management and control of said property.

Wherefore, the plaintiff demands judgment for the possession of the said premises and for such income or rentals as the defendant may have received from the withholding of the same since the 20th day of August, 1917.

Paragraph 12 of answer: In answer to paragraph twelve, defendant admits that the Canal Commission wrote defendant that such Commission was ready and willing to enter into satisfactory

65 arrangements with regard to said canal, but, upon information and belief, denies that defendant failed and declined to make any satisfactory arrangements, and, on the contrary, defendant alleges that it did make every reasonable effort to make satisfactory arrangements with such Commission with regard to said canal, but that said Commission refused defendant's offers without

explanation, although the same was requested, and said Commission refused to discuss the arrangments or to disclose any terms or propositions that it would consider satisfactory.

It admits that Section Three of said Act of 1917 is quoted in said paragraph twelve, but denies that the whole of said Act is quoted in said paragraph, and demands reference to the entire Act in proof of its terms.

It admits that the Canal Commission, consisting of the officers of the State designated by said statute, did, on the tenth day of August, 1917, write a letter to this defendant to the purpose and effect referred to in said paragraph twelve, but it demands production of said letter in proof of its terms.

It admits that the defendant, on the fourteenth day of August, 1917, did write a letter to the said Commission to the purpose and effect set forth in said paragraph twelve, but it demands production of said letter in proof of its terms.

It admits that on the twentieth day of August, 1917, the said Canal Commission did write a letter to the defendant to the purpose and effect set forth in said paragraph twelve, but it demands production of said letter in proof of its terms.

The defendant denies that it has knowledge or information sufficient to form a belief as to what the said officers, mentioned in said paragraph two of the Act of 1917, upon consideration, did conceive it was appropriate and proper for them, as representatives of
66 the State of South Carolina, to do. Defendant admits that this action is instituted by the Attorney General, by virtue of the provision of paragraph three of said Act of 1917.

Except as hereinbefore specifically admitted, defendant denies each and every allegation in said paragraph contained.

Paragraph 13 of answer: Denies each and every allegation of the complaint not herein before specifically admitted.

The answer contained a second defense as follows:

That prior to December 24, 1887, the State of South Carolina was the owner of the property known as the Columbia Canal, the same being then vested in and under the control of an agency of said State known as the Board of Directors of the South Carolina Penitentiary. That by an Act of the General Assembly of South Carolina, approved December 24, 1887, and entitled (quoting the title of such Act, 19 Stat., 1090), such Board of Directors were required to convey said property to a body politic and corporate, also an agency of said State, created by said Act of 1887, and known as the Board of Trustees of the Columbia Canal, and such conveyance was duly made by deed in February, 1888, said Board of Trustees taking possession of said property thereunder.

That the said Board of Trustees were by said Act of December 24, 1887, as amended by an Act of the General Assembly of South Carolina, approved December 24, 1890, entitled (quoting the title of such Act, 20 Stat., 967), authorized to sell said property known as the Columbia Canal, subject "to all the duties and liabilities imposed" by said Act of 1887, and "subject to all contracts, liabilities and obligations made and entered into by said Board prior to such

sale and transfer." But said amendatory Act of 1890 did
67 not authorize or require said Board of Trustees to make said sale subject to any conditions whatsoever.

That pursuant to said amendatory Act of 1890, the Board of Trustees, on the 20th of January, 1892, by their deed duly executed, sold and transferred said property to the Columbia Water Power Company, a corporation of South Carolina; said purchase being made by said company, for valuable consideration and in good faith in reliance upon the terms of said amendatory Act of 1890, as defendant is informed and believes.

That thereafter, on July 1, 1905, the said Columbia Water Power Company conveyed said property to this defendant (under its former corporate name) by proper deed, the said purchase being made by this defendant for valuable consideration and in good faith in reliance upon the terms of the said amendatory Act of 1890.

That defendant duly entered into quiet and peaceable enjoyment and possession of said property, and has continued to so hold the same until the time hereinafter specified.

That by an Act approved the 12th day of March, 1917, entitled (quoting the title of such Act, 30 Stat., 348), the State of South Carolina, by its General Assembly, undertook to determine, by its own fiat, what was the contract between itself and defendant, and to adjudge that by such contract defendant had forfeited its property rights in and to said Columbia Canal, and ordered certain officers of the State to confiscate the property of defendant.

Defendant alleges that by said amendatory Act of 1890, and the deeds to its predecessor in title and itself thereunder, a contract was made between the State of South Carolina and defendant which contained no conditions subsequent, or otherwise, working a forfeiture of said property, and that the said Act of 1917 is a
68 law impairing the obligation of defendant's contract with the State and is repugnant to Section Ten of Article One of the Constitution of the United States.

Defendant alleges that said Act of 1917 and the acts and doings of the officers and agents of the State thereunder, including the commencement and prosecution of this suit and any judgment of forfeiture that may be endeavored to be entered against defendant herein, deprive defendant of its liberty and property without due process of law, deny to defendant the equal protection of the laws and impair the obligation of defendant's contract, in violation of the Fourteenth Amendment and Section Ten of Article One of the Constitution of the United States.

Wherefore, defendant especially pleads and sets up and claims the protection of Section Ten of Article One and the Fourteenth Amendment to the Constitution of the United States.

NOTE.—Both complaint and answer were verified and in proper form—either party may refer to complete allegations if desired.

Summary of Testimony and Proceedings on Trial.

Testimony of Plaintiff.

Mr. Abney: We have noticed defendant to produce "All minute book or books of stockholders' and directors' meetings of defendant company, covering the period beginning January 1, 1905, and until the commencement of this action." We ask for their production at the present time because we want to examine them.

Mr. Lyles: We have those books, but we do not concede that counsel has the right to examine them. We produce them in response to their notice, and when they are offered in evidence
69 we reserve the right to object to their relevancy, and we do not concede that the notice to produce requires us to bring our records in Court and turn them over to attorneys for the other side.

Mr. Abney: When the books are produced we should have the opportunity to examine them before we are required to put them in evidence.

Mr. Lyles: We put ourselves on record at this point also as objecting to anything brought out before the Legislative Committee in its investigation and anything produced by defendant before the Canal Commission, for the purpose, as stated by the Supreme Court, of the legislative investigation, is irrelevant and incompetent in this case.

Mr. Abney: We desire, also, to be put on record that we do not propose in this case to use as prima facie or original testimony the testimony taken by the Commission under an investigation directed by the General Assembly.

The Court: Then I will direct counsel to produce them (which was done).

Mr. Abney calls attention to the following:

Act of 1887 creating the Board of Trustees of the Columbia Canal, 19 Stat., 1090;

Act of 1887 authorizing the city of Columbia to guarantee the interest on the bonds, 19 Stat., 1097;

Act of 1890, amending the Act of 1887, 20 Stat., 967;

Act of 1912, 27 Stat., 779; Act of 1917 under which this suit is brought;

Act of 1878, 16 Stat., 360;

Thompson & Nagel Act of 1879, 17 Stat., 87;

Act of 1882, 17 Stat., 855.

Mr. Abney called attention to all Reports and Resolutions and Journals of the Senate and House of Representatives, covering all the history of the canal, etc. Upon objection by Mr. Lyles
70 the Court ruled that it would rule on the admissibility of each when it was offered to be read.

Plaintiff then put in evidence:

Exhibit 4: Deed from Board of Directors of South Carolina Penitentiary to Board of Trustees of Columbia Canal.

Exhibit 5: Deed from Board of Trustees of Columbia Canal to Columbia Water Power Company.

Exhibit 6: Deed from Columbia Water Power Company to Columbia Electric Street Railway, Light and Power Company.

Mr. Abney offers in evidence a plat made by the engineer, Byron S. Holley, showing "the lands and the canal as it existed at the time of the conveyance to the Columbia Water Power Company."

Mr. Lyles objects: "We did not buy the property according to this plat—there is no evidence that it was part of the contract with the State under which we or our predecessors bought the property and it is not binding on us; further, that the statute defines the property and this plat is irrelevant as being merely the ex parte opinion or suggestion of Mr. Holley."

B. L. ABNEY, white, duly sworn:

Testifies that Holley map was made by Holley as Engineer for Trustees of Canal and was one of the records of such Trustees; came into Abney's possession as attorney for Trustee and then later as attorney for certain grantees of Trustees—in his possession since 1891, as attorney for the Board of Trustees and such grantees and comes from Abney's possession as attorney for defendant company.

71 Cross-examination.

By Mr. Herbert:

Holley Plat offered in evidence and admitted, over objection repeated, as Exhibit No. 7.

JUNIUS T. LILES, white, sworn:

Direct examination.

By Mr. Abney:

In 1917 I was Chairman of the Ways and Means Committee of the House.

NOTE.—All communications between the Canal Commission and defendant, as well as all portions of the record of the Commission introduced in evidence are printed in chronological order as Exhibit 8. See Appendix.

The Canal Commission organized under the Act of March 12, 1917, and I was ex officio a member and was elected Secretary. We kept a record of all our proceedings. In our letter of March 28, 1917 (Exhibit 8*a*), we advised defendant we had organized under the Act of 1917 and were ready to receive any communication, etc.

Mr. Lyles: We object to any ex parte statement or entry on the minutes with which we are not connected and when we were not represented.

The Court: Any ex parte statement of fact would be incompetent, but the minutes are proper evidence to show what the Commission did. The Commission was appointed for the purpose, among other things, of bringing an action, if necessary, and in order to show the acts of the Commission, their minutes are proper evidence. This Commission is the agency through which the State passed upon the question as to what the State should do.

The written communications between the Commission and defendant and also the Commission's minutes of meetings at which
72 defendant was represented—during witness' term as Secretary were then put in evidence and read to the jury—they appear in Exhibit 8. For convenience other written communications which were in evidence between the Commission and the defendant are included under this exhibit in order that the same may appear in consecutive order.

Cross-examination.

By Mr. Herbert:

So far as I know everything has been put in to cover all dealings between the Commission and defendant while I was Secretary. I recognize this as our printed report to the Legislature which we signed and submitted in 1918.

Q. Did you not report to the Legislature at one time as follows: "It was at one time supposed that for navigation purposes it would not be necessary or expedient to extend the canal throughout its entire length to Rocky Branch, but as your Commission is now informed, the engineers of the United States in charge of the improvements upon said rivers have reached a conclusion, contained in their reports, that navigation to be made properly serviceable and adequate for the commerce upon the river, the canal should be extended from Gervais street to its entrance into the Congaree River near Rocky Branch?"

A. Yes, sir.

Q. I will finish the paragraph: "That such a reference to the reports of these engineers will bear out these statements with regard to this matter, however, we hereto attach a letter written by Mr. Whitescarver, the United States local engineer in charge of the work with regard to this matter, and we call attention to the interest in the navigation features of the canal and Congaree River to what is now appearing in the public prints with regard to the expediency and benefits that will accrue to the city and to the people of the
State at large from the opening of this canal and the joining
73 of the waters of the Congaree and Broad rivers."

A. Yes, sir.

Q. So your Commission found at one time it would not be necessary or expedient, it was supposed to extend that canal?

A. They so reported; yes, sir.

The city of Columbia and Columbia Mills have plants down on the canal and take water power out of it. I think the Commission instructed the Commission to collect rents. I do not think the Commission ever took any action against them.

Q. You don't find anything in those communications, any statement where the Commission said to this company, "We want you to go down there and start digging and complete this canal?"

A. I haven't looked for such statement, but I don't think they ever made any of that kind.

Q. Nowhere did they ever say, "We want you to go down there and complete this canal?"

A. No, sir. I recall this——

Q. Tell me in the record where you ever told them to go down there and start digging and complete this canal?

A. Only to this extent, as I recall now: "In your consideration of this matter, have the people you represent thought of proposing to this Commission to carry out your contract with the State."

Q. And they said they had, but did you ever tell them, "We want you to go down there and start digging that canal on from Gervais street to Rocky Branch?"

A. Not that I know of.

Redirect examination.

By Mr. Abney:

Q. I call your attention to the statement in the report of the Canal Commission that it was at one time supposed that for navigation purposes it would not be necessary or expedient to complete
71 the canal throughout its entire length to Rocky Branch. Were you the author of this report or a member who signed it?

A. I signed it after it was adopted.

Q. Did you have any personal knowledge of this previous opinion or did you sign it because you assumed that the other members knew something about it?

Defendant objects: He can't contradict his own witness or deny the report of the Commission which he signed.

The Court: The record is the voice of the Commission, but I will let him say how that statement was made in there.

Witness: The report was compiled, discussed and signed. I signed it as a member of the Commission. I have no scientific knowledge as to whether a stream is navigable or not, but every phase of the proposition was discussed. I tried to learn and serve the interest of the State as best I could. When the report was compiled, after due discussion and consideration, I signed it and stand by it.

The entire Commission went down, one or more times, and inspected the canal. I went up and down it until I got tired of it. According to my judgment the canal was not in good condition above Gervais street.

The old channel below Gervais street has grown up in weeds and trees and Gervais street divides it from the canal. Apparently years ago there might have been some work done on the old channel below Gervais Street, but no work appeared to have been done there in fifteen years.

The United States Government constructed a dam across the Congaree River below the railroad bridges and there was an attempt to open a channel in the river up to Gervais street, but I cannot answer definitely as to what was done or how successful it was. I do not think the government work did any good in the interest of navigation.

75 Recross-examination.

By Mr. Herbert:

Anyone could see there had not been any digging in the canal below Gervais street in recent years.

I was informed that the government dam was to back the water up to Gervais street. If the dredging of the channel in the river had been successful and they could have kept it open, I suppose (if the canal had been constructed to Rocky Branch) they would have had two navigable streams right side by side. I don't think it would take two waterways to handle boats—I would not build two roads side by side. I have no idea the quantity of freight would demand two waterways.

Q. So long as there was any probability of the government dam being a success, as a practical man, you would not have thought it advisable to go there and start to build another one—another one right by the side of that one?

A. If it had been me or my own property and the government was going to dig a channel there for me, I would let them do it, but if I had a contract to fulfill I think I would have gone ahead and fulfilled it.

Q. You wouldn't start building a road right along side of one another man built—another road to serve the same purpose?

A. Ordinarily; no, sir.

Redirect examination.

By Mr. Abney:

The government plan proved a failure. I have never heard of anything accomplished in that effort. I assume that as long as the Legislature of South Carolina thought the government would make a feasible and adequate way there, there was no need for another way.

76 Recross-examination.

By Mr. Herbert:

I don't know when the government dam was completed. It could have been in 1914 or 1915 so far as I know.

JOHN P. THOMAS, white, sworn:

Direct examination.

By Mr. Abney:

The witness identifies tracing made by himself in 1888 or 1889 of an old map of Tingley relating to the Columbia Canal, which old map was furnished to witness as a member of the law firm of Abney & Thomas, Mr. Abney then being an attorney for the Canal Commission, by Colonel Pearce, who was the representative of William Sprague, formerly interested in the canal as a purchaser under the Acts of the Legislature and assignee of Sullivan Fenner. The old map was burnt in 1898 when the City Hall was destroyed. This tracing was then allowed in evidence over the objection of defendant that the map was not referred to in its contract or conveyance and was merely the ex parte information or suggestion of the party who made it.

Mr. Abney offers in evidence the opinion of the Supreme Court in the case of State ex rel. Lyon, Attorney General, v. Columbia Water Power Company et al., 82 S. C., 81; 85 S. C., 113; 90 S. C., 568.

Mr. Lyles: We object to them because they are not alleged in the complaint as a foundation of this action and are, therefore, irrelevant as matters of record or res adjudicata: you cannot sue on a judgment without alleging the judgment.

The Court: The record in that case might bear upon the issue whether the State had asserted its rights against an intrusion upon its rights in this property, and also whether it had waived its rights in regard to the canal as a navigable stream. It would show action by the Attorney General in order to protect the alleged rights of the State in these matters. I think for that reason the record would be admissible.

Mr. Lyles: An additional ground of objection is that that litigation did not involve any question of forfeiture. The Supreme Court did not adjudicate anything along the same line now before the Court at all.

The Court: I think it is relevant in the view that it shows an assertion by the State.

G. R. LUKESH, white, sworn:

Direct examination.

By the Attorney General:

I am a Colonel in the Engineering Corps, United States Army, and in charge of the river and harbor improvements of Charleston and South Carolina District, which includes practically all streams flowing into the Atlantic Ocean within the boundaries of this State. I am generally familiar with the Santee River and its tributaries

from the standpoint of navigability, and I have a sketchy general knowledge of the projects under discussion in this case.

I have a fair knowledge of the conditions in the Congaree River from the Government dam down to the mouth of the Santee, from a navigation standpoint. Going down stream from the Government lock and dam for the first five or six miles a number of shoals are encountered relatively worse than anything below that point. Below that point there has been one bad place in the crossing of the Southern Railway at Moye, due to the location of the draw of the bridge, which has been practically corrected by the transfer of the
78 draw to the other side of the river. The obstructions, however, have all not been removed. The river, it might be stated, is suitable for four-foot navigation in the stretch that has been mentioned, from the Government dam to the mouth of the Wateree, with the exception that at very low waters difficulty has been encountered in the first five or six miles below the Government dam.

There are two or three ways in which that difficulty could be solved more or less successfully, and at more or less expense, for navigation purposes. A dam and lock might be constructed at a point a short distance below the lowest one of the shoals in the five or six miles sector I have mentioned, sufficient to increase the depth so that boats could reach the existing locks and dam without trouble. The second method would be a lateral canal adjacent to the river past the section containing the shoals. A third method would be the removal of the shoals themselves by works of river regulation and dredging.

By the Attorney General:

Q. Are they practicable from an engineering standpoint?

A. You mean feasible?

Q. Yes, sir; are they feasible from an engineering standpoint?

A. They are feasible possibly, though the expense of one or more of the methods might be out of proportion to the benefits derived. Any one of them could be done. I have not said that the Congaree is not navigable without one of those three methods being applied.

A canal completed from Gervais street to near Rock Branch, according to the dimensions given (in the Act of 1887) would form a link of a navigable waterway from the Atlantic Ocean to Columbia, an outlet at the present time being through Esterville, Minin Creek Canal, which connects the Santee River with Winyah Bay.
79 That would place Georgetown in connection with Columbia by river navigation.

Cross-examination.

By Mr. Herbert:

The difficulty in navigation that I referred to at six miles below here is where you encounter Congaree Creek and Gill Creek. From

a study of the map I know where Rocky Branch comes into the river a hundred yards below the Government dam; from this point up to the Government dam there is no obstacle to navigation.

Q. You spoke about a canal to obviate this difficulty—you mean a canal to get around that shoals at Congaree and Gill creeks?

A. Yes, sir.

Q. And the completion of this canal from Gervais street to Rocky Branch would not have the slightest effect on that?

A. It might be made continuous.

Q. If it stopped at Rocky Branch, it could not have any effect on that condition you were testifying about?

A. No.

The United States Government's plan for navigating the river from Gervais street down to Rocky Branch was to build the dam that has been built and not to dig a canal from Gervais street to Rocky Branch; this was the solution that the Government adopted for their own work, but that was not an exclusive solution. That was the method the United States Government adopted to navigate the upper end of this river, and they have spent about five hundred thousand dollars on that proposition.

The government has spent thousands of dollars, from year to year dredging the river. The dredging has been kept up until the last two or three years. The dredging only gives temporary relief because when it shoots the sand out on the bank the next rain washes it back again, but as a general rule the channel will maintain itself.

80 The section below the government lock and dam is, practically speaking, in no better condition than it was a good many years ago, notwithstanding all the work the government has done on the river. It was appreciated at the time that the work was temporary.

There has been no regular line of boats on the river in two years. There have been boats on the river within that time. So far as I know there hasn't been a ton of freight moved on the river within two years. The government dredge is now at Charleston. There is a maneuver boat pulled out for repairs at the government works.

With reference to the government dam and lock itself, I consider that is an improvement. The dam was built by the government about a mile and a quarter or a mile and a half below Gervais street at a cost of four or five hundred thousand dollars and lifts the water about ten feet, with a view of making it navigable up to Gervais street. That's what I understand. That work has been going on since about 1905, and the dam was rebuilt some years later, probably about 1914. I am not sure of that date as it was before I came to this district.

The Attorney General objects to the latitude of the examination.

The Court: The statute in this case allows them as long as is necessary or practicable to do the work, and therefore, it does *not* mean the work to be done immediately but as soon as practicable.

Therefore, this testimony is directed to the question as to within what time it would be practicable to do this work.

The Attorney General: It doesn't make any difference, it seems to us, whether this project is useless or what not. It is a question as to whether it is practicable from an engineering standpoint—not the connection of the waters of the Santee or Broad, except
81 as it relates to the completion of this canal; and we are concerned with the completion of the Columbia canal.

The Court: I agree with you on that.

Mr. Lyles: There is not one question, but two questions before this Court. The first question, so far as this particular allegation of breach of condition goes, that is, the completion of the canal to Rocky Branch, involves the question as to what time, and means as soon as practicable. The second question, as set forth in the decision of the Supreme Court, is, assuming that plaintiff establishes that defendant has not completed the canal as soon as practicable, are the circumstances of that failure of such a character as to justify a forfeiture of the canal. The Court must bear in mind that there are two distinct questions. The Supreme Court says whether a reasonable time has in fact elapsed. That is one question, and whether under all the circumstances the drastic remedy of forfeiture should be adjudged without any further time, are questions upon which they express no opinion, since they are matters of defense and will depend upon facts and circumstances developed at the trial. We must meet those two charges all at once. We are not going to have a separate trial on the question of failure to complete the canal as soon as practicable, and another trial on the other question of whether the circumstances of that failure were such as to justify a forfeiture. We must try those two issues all at once because they are so intermixed.

There is no decision of our Supreme Court that "as soon as practicable" relates only to time. We did not agree to complete the canal within a definite time, but as soon as practicable.

On the second branch, as to whether, granted they prove that defendant violated its contract to complete, they must show that
82 common justice calls for a forfeiture, for we are going to undertake to show that the State received the most substantial portion of the benefit called for by its contract, and that the completion of the canal was a minor, unimportant part of the consideration from the standpoint of the State; that the failure to complete did not deprive the State of any benefits, or if the canal had been completed in 1892 it would have been of no benefit to the State. And no Court in this country would work a forfeiture of this property because of the failure of a minute part of the consideration. With those two questions intertwined, why can't we show all of the circumstances surrounding this matter from 1892 to the present day?

The Court: I think the evidence as to the facts and circumstances will be relevant in order to show what was a reasonable time and would bear on the question of practicability for the jury.

Mr. Abney: The existence of a shoal below the confluence of the Congaree and Wateree rivers is no excuse for these people not performing their contract.

The Court: No, I do not think it would be, but the question is, what would be a reasonable time in which to build this canal. Now, in determining that question, you must have regard to the facts and circumstances surrounding the people at the time that they might have done the work.

Mr. Herbert: The plaintiff brought out about the shoals down the river and I am simply cross-examining him.

The Court: Yes, sir, that was brought out on direct examination. I will let in the testimony, but I do not think it would be a defense to show that the river was not being used for navigation, for it might be used. It is navigable in the eyes of the law. But I will allow this testimony to go in to show how it is being used, or can be
83 used, as one of the circumstances which the Court might take into consideration.

The Witness Resumes: I have already said that in my opinion the government dam and pool constituted an improvement up at this end of the river.

Q. As a practical engineer, would you advise the building of a canal around that pool and dam which has cost the government a half million dollars?

Upon objection by the plaintiff, the Court ruled that it doesn't make any difference as to what the witness might answer as to this question after defendant contracted with the State to build the canal.

Mr. Herbert: We brought out while Mr. Liles was on the stand, that parallel to the canal which we should dig as soon as practicable the government had constructed a waterway to do everything that the canal could have done, and they themselves said that it was inadvisable and unnecessary to complete our canal until the government had failed, and they went on and said that the government had failed. That was brought in not only on the ground as to whether it had been practicable but also on the ground that we should not forfeit our property for failing to do something that the United States government had rendered of no importance. But I have the right to ask the question on the further ground to test his expert knowledge, whether or not he would advise the digging of a canal around a pool that already served the same purpose.

The Court: I do not think that would be relevant, because here they had contracted to complete this canal as soon as practicable. Now they cannot come in and change the plans. That would be as much as asking the witness whether he thinks they ought to complete the canal at all.

Mr. Herbert: We contend that it has never been practicable—that since circumstances and conditions have rendered it of
84 no importance, since it would have done the State no good and have been a benefit to no one, it is a question of whether or not the drastic remedy of forfeiture should be applied. The State has never demanded that we complete it and we can show that nobody ever wanted it completed, because it would be of no benefit, and for that reason no Court of justice would forfeit our property

because we had not done something that would do no good to anybody.

The Court: I think it is irrelevant.

Q. In your opinion, would that government pool, if completed in a proper way, have floated boats up to Gervais street?

The Attorney General: We object. They cannot excuse themselves for non-performance because the government has done something. They are entirely two separate entities.

The Court: I sustain the objection on the ground that because the government might have built some other way to make navigation is no defense for this defendant not doing it.

Q. If you were going to advise a canal down there from Rocky Branch up to Gervais street, to do any good under present-day conditions, what dimensions would you suggest?

Mr. Lyon: We object.

The Court: Yes, sir; the objection is sustained on the ground that the statute prescribes what dimensions this canal should have.

Q. If a canal were built from Rocky Branch up to Gervais street, 120 feet wide at the top, 80 feet wide at the bottom, and ten feet deep, would that enable boats to come up to Gervais street any better than the government dam there, the river being a four-foot navigable stream?

85 Mr. Abney: We object to that, too.

The Court: Yes, I think that is the same question, because it is not a question of what the government might do.

The witness resumes:

I have already said that I consider the government pool an improvement on navigation up to this end of the river. The government dam and lock gives a lift of about ten feet and was intended to give a depth of about four feet at Senate and Gervais streets. I am not familiar with that—this was the purpose of it.

Q. Is it not a fact that in a narrow canal where you have a certain front for power purposes, that is a difficult canal to use for navigation purposes?

Mr. Lyon: We object.

The Court: I rule that out. It doesn't make any difference whether it is difficult to navigate, but whether it is difficult to build, that might be important.

Q. To try to operate a boat in a canal only one hundred and twenty feet wide that had a front for power purposes, it would be very difficult to bring a boat through the narrow channel of water?

Mr. Lyons objects.

The Court: Objection sustained on the ground that that is what the contract calls for.

The witness resumes:

The government began the construction here in 1902 and it washed away in 1905 and was rebuilt a few years later. So it has taken from 1902 to finish the dam if you consider the period of time when the dam was out of commission and no work was done.

It has been more difficult since 1914 than in normal times
86 to get labor and material to do engineering work due to the fact that this country and other countries have been engaged in war.

The proposed extension of the canal lies down near the river and would be subject to overflow by high floods, at least in some places. In some places they would actually have to build the banks of the canal above the ground. For navigation purposes it would be all right to have the bottom at different depths. But for power purposes it would be a handicap to have the bottom deeper in some places than in others, and to get a continuous level at the bottom it would have to be built up above the level of the surrounding surface.

Mr. Abney: We move to strike that out. This Court has decided that navigation is the dominant purpose.

The Court: But the contract calls for the building of a canal that might be used for both purposes. I think it would be for the jury to consider what labor and other things would be necessary, and what difficulties would present themselves in order for them to determine what would be a practicable, reasonable time.

The witness resumes:

I am not familiar enough with the soil to state whether it is unsuitable for canal banks. If it is sand and silt, the ordinary river deposits, that would by itself be unsuitable for canal banks. It would increase the work and make it more expensive to go elsewhere and get the soil for the banks and take more time with the same labor.

The river during the freshet of 1908 was forty-one feet here in Columbia and the banks of the canal would have to be strong enough to withstand the river, as they would be subject to overflow.

87 Redirect examination.

By the Attorney General:

The labor conditions and facilities for carrying out a project of this kind from an engineering standpoint were not more difficult or more expensive during the period from 1905 to 1917 than they were on November 6, 1919. They were more difficult and more expensive on the latter date.

When the decision was made to rebuild the government dam I think that the Columbia canal was considered as a possibility and it was decided to go ahead with the reconstruction of the dam instead. The canal was considered in view of its accessibility for terminal purposes.

Cross-examination.

By Mr. Herbert:

I got my information that the government considered the canal from this report (handed him by Mr. Herbert). The Board recommended only that the Columbia canal be extended down into the government pool. I have never seen any government report recommending that the canal be completed all the way around the government pool and into the river below that at Rock Branch.

Redirect examination.

By Mr. Abney:

As an engineering proposition I would advise that the banks of the canal be constructed high enough so that it would not be affected by the overflow of the river.

Recross-examination.

By Mr. Herbert:

It would take more money and time at first to build the banks high enough.

88 It is probable that the height of the 1908 flood was forty-three feet instead of forty-one feet.

There is a fall in the river from Gervais street down to the government dam. I believe this is eight feet. The water down at the government dam rises faster than it does at Gervais street because of the shoals and the width of the river—but whether it rises exactly twice as fast I am unable to say.

J. L. LUDLOW, white, duly sworn.

Direct examination.

By Attorney General:

Witness: I have been a civil engineer for thirty-five years and am now associated with the Ludlow Engineers. I have been a hydraulic engineer for a number of years. I made a survey of the Columbia canal during October and November, 1919, and am familiar with the Acts of 1887 and 1890 relating thereto.

According to the figures given in the Act the portion of the canal remaining incompleted, from Gervais street to Rocky Branch, is specified as 8,700 feet, but as matter of fact, it is probably 1,000 feet additional, or approximately 10,000 feet.

The dam on Broad river which diverts the water into the canal is a timber crib dam. The cribs are weighted with rock and fastened by large timbers extending across the river in a U shape, in height six to eight feet, with top boards sufficient to raise the water to eight

feet. I don't know when the dam was constructed, and it depends on many circumstances as to how long it would stay there. The timber in the dam was not in good condition—some of it showed considerable decay—there was considerable leakage through the joints.

89 There are no obstructions to navigation in the canal but a couple of bridges across it, one at the city waterworks and one at the Duck Mill, which would obstruct the passage of boats.

The canal is not developing any horse power at the south side of Gervais street, but approximately there, to the north, it appears to be developing about 8,500 horsepower at the present time, including 500 horsepower at the City Water Works some one-half mile above.

At the present power house there are emplacements provided to put additional machinery in the power house, which would bring the total capacity up to 11,000 horsepower—then it would be developing 11,000 horsepower only at certain seasons of the year at that point.

Increasing the heighth of the dam would materially increase the amount of power developed at that point. The canal banks would have to be raised to a moderate extent.

It is feasible to erect a dam on Broad river that would give an elevation of 155 24 100, which is the elevation to give a head of thirty-seven feet above mean low water on the south side of Gervais street. The present dam gives about two and one-half feet less than that.

In my investigation I determined that if the dam was erected to give a total head of thirty-seven feet above mean low water on the south side of Gervais street, the total output of power would vary between 10,000 and 11,550, estimating the flow of the river for the various seasons of the year and based upon the government data published for Alston, a short distance above Columbia, the total kilowatt hours would be 70,440,000. Reduce that to a commercial amount for delivery by making paper deductions for the inefficiency of electrical machinery would bring the net power to 65,509,200 kilowatt hours. The sale of that power, based upon an average of

90 four mills per kilowatt hour for the entire output, would amount to an annual net revenue, after deducting operating expenses, of $247,036.80.

I am familiar with the topography of the canal from Gervais street, down to Rocky Branch and no difficulties of a serious character would be encountered in developing the canal according to the specifications of the Act. The only adverse condition is the nature of the soil which would require the bank to be given a proper slope to avoid the danger of its sliding on the water side or being disturbed on the outer side. The Act did not specify on the outer side what those slopes should be. I do not think the grade of soil would be any serious adverse condition. The construction of the canal to the mouth of Rocky Branch is absolutely a feasible proposition. The canal, constructed as stipulated in the Act, would admit of such river traffic as would probably occur on the Congaree—it would not accommodate the Mississippi River traffic. The boats on the Con-

garee would not be large and not of great draft, flat bottom, drawing two or two and one-half feet. It has been sought to get four feet in this river.

Q. As an engineering and economic project, do you not consider the development of that canal, according to the requirements of the Act, a practical proposition?

A. Yes, sir.

Mr. Lyles: That is a question for the jury.

The Court: That is ultimately a question for the jury, but if he has surveyed the canal I think he can say whether or not it is practicable.

The Witness: I would consider it entirely practicable, both from an economic and practical standpoint.

I have made a blue print showing the general lay of that canal, and how you could develop it on these sheets, Exhibit No. 11. These are the detail sheets. This is Congaree river. These identify the whole proposition. The government dam is located at
91 this point. Here is Gervais street. This map here shows a small portion of the canal above Gervais street and follows down this line down to a point about 1,000 or 700 feet below the government dam at a point near the mouth of Rocky Branch, and the line I show here follows almost exactly the original canal location. This line here is another line—another location by which it might be accomplished. From Gervais street down to the mouth of Rocky Branch, the point designated by the Act, below the government dam, it is approximately 10,100 feet, that is from this point designated by the Act.

Q. Would that or not give the city of Columbia terminal facilities?

A. That, Exhibit No. 11, provides at a point between College and Pendleton streets, for both turning basins, walls and docks and warehouses, and also feasible at that point to have direct railway connection to the tracks of the Atlantic Coast Line up near Gervais. And the completion of that canal is absolutely a practical proposition.

The Attorney General: We desire to offer these blue prints, Exhibit 11, in evidence.

Mr. Lyles: We do not concede that these blue print delineations of the canal are delineations as required by the Act. They are only the opinion of this witness.

The Court: It is permissible to show how the canal might have been constructed according to this witness who has testified as an expert. It goes in as his opinion.

(Blue Prints received as Exhibit 11. See Appendix.)

The Witness: It was less difficult and less expensive to construct a project of this kind during the years 1905 and 1918 than in the year 1919. During the years 1905 to 1918 I should say that from eighteen months to two years would have been a reasonable time

allowance within which to do the work of construction. At the present time I have not very much of an opinion as to the time within which the work could be done because things are in
92 such a demoralized condition and are subject to change for better or worse, so that I could not fix a time now as well as I could prior to 1917. I should say altogether that it ought not to take very much more time now if a man were energetic and had the means and could buy his equipment.

As to the cost of construction, the estimate that I made last October, 1919, that the cost to complete the canal and the canal locks was $623,500. At the present time the cost would probably be somewhat higher, but these figures are very much in excess of the cost in 1905, 1910 and 1914.

The extension of the canal down to Rocky Branch would increase the available power by about 16%. It would increase the fall, and the greater the fall the greater the power. At Rocky Branch the horse power would be about 14,500 as compared with 11,500 at present.

Cross-examination.

By Mr. Herbert:

The Witness: When this Act was passed in 1887, it was just on the eve of the development and transmission of electrical power. I assume that electrical power was not thought of at the time of the passage of that Act but the power was the same as we consider it now.

The power house of defendant is about 160 feet north of Gervais street and about from 150 to 250 feet from the south side of Gervais street. If the water in the canal in its present condition was all brought down to defendant's power house and passed through the wheels there, the power that it would develop would vary during the various seasons of the year—I think the maximum would be something over 10,000 horsepower there—it would be slightly less than at the south side of Gervais street because there would be a little less head available but not any great difference. The present
93 lock at the north end of the canal is about 15,000 feet north of Gervais street, about three miles.

In 1887 and about that time the best method for ultizing water power from such a canal was to put the mill between the canal and the river and run the water through the wheels of the mill. Soon after that time the method was developed of building the power house between the canal and the river and using the water from the canal through the wheels of the power house to generate electricity there, which was carried by wires to any point where they chose to build the mill. After the method of developing and using the power was changed in this way, I would not, as a practical engineer, have advised the location of a mill down between the canal and the river. The practical method of utilizing the water of the canal was changed from that contemplated by the Act. The Byron-Holley

plats show that it was then intended to put the mills between the canal and the river, at various points, all the way down to Rocky Branch.

Q. Taking into consideration the known methods of developing horsepower at that time and using horsepower, and the fact that you could scarcely build one factory that could use the entire 10,000 horsepower at one point, and taking into consideration the fact that the Act seems to contemplate the use of that horsepower at these various mill sites along the river, isn't, from an engineering standpoint, it clear that when the Act says to develop 10,000 horse power at the south side of Gervais street, that the interpretation from an engineering standpoint would be that the canal would be completed to such capacity that if all the water coming through it were utilized at that specific point that it would create 10,000 horsepower?

A. That is correct.

94 The dam is a diverting dam, to divert the flow of the river into the canal. If the dam diverted enough water to fill up the canal, it makes no difference about its leaking, if you had an overflow of water all time.

In my figures based on the capacity of the river at Alston, I realized that at certain seasons of the year all of the water of the river could not run through the canal, while at other seasons the river would not bring sufficient water to get the complete power of the canal.

The Act allows the city to take their water power at any point on the canal it sees fit. Where they now take it, they work under a twenty foot head. If they took it up near the locks, they would work under an eight or ten foot head and it would take three or four times the amount of water to create the 500 horsepower than it does down at Gervais street.

There is a sixteen-foot lock at the north end of the canal, which is there now, but the Holley plat does not indicate any lock on the Rocky Branch end; it provides for a waste-way but no lock. It would be impossible to get boats up in the canal there without a lock; that is, it would be possible by having an incline track from the level of the canal to the river and hoisting the boats but it would not be practical.

I did not see anything in the Act about such a pool as I have provided for in my plans.

At the time I measured the canal in the fall of 1919, its capacity was 2,429 second feet. I cannot tell the full normal capacity of the canal as now constructed, but I calculated that on the basis of 7/10 run per square mile, which would be 3,430 second feet normal flow. At certain seasons it would be more and at other seasons less. By "second feet" I mean that so many cubic feet of water passing a given point each second.

95 Speaking of horse power, it means mechanical horse power on the wheels, which is always somewhat less than the power actually developed and transmitted as there is some loss on the wheel and also in transmission. I have estimated that a wheel of 1,000 horsepower of water would get only 850 horsepower on the

wheel, and then if you transmit that electrically, you would have nother loss.

If the canal could flow at full capacity all the time and all the vater was passed through the wheels of the present plant of de-'endant, it would develop something over 10,000 horsepower, but the 'iver does not furnish water enough to give the maximum flow all he year.

The wheels in use at the time of the Act of 1887 were only sixty or sixty-five per cent. efficient; that is, they only developed sixty o sixty-five per cent. of the water power passed through them.

My estimate of $623,500.00 as of October, 1919, includes $352,-00.00 as the cost of the lock at Rocky Branch, and also the digging f the canal and the conduits. As of the same date, I estimated that would cost $701,000.00 to complete the canal without a lock and ith a power house, and you would get from about twenty per cent. dditional horsepower, about two thousand additional horsepower, nd the canal extended would be very much more subject to damage y high water.

Q. From an engineering standpoint, would you advise the ex-enditure of something over seven hundred thousand dollars in rder to secure two thousand additional horsepower?

A. My testimony heretofore given was not predicated upon what ou are trying to get at. When I answered that it was an economic, asible proposition, I had in mind the value of the power from the ater development at Rocky Branch over the value of the power that has been developed at the present time at Gervais street, which gives an excess of $111,000.00 at Rocky Branch, and not $70,000 or two thousand horsepower, as you have implied. s matter of fact, the full amount of power has not been developed the north side of Gervais street. The difference in the possible velopment at the south side of Gervais street and the possible velopment at Rocky Branch is about 2,500 horsepower, due to the creased head at Rocky Branch, and the difference between the ssible development at Rocky Branch and the present develop-nt at Gervais street is greater, because they do not now generate full capacity of the water in the canal at Gervais street. Even 2,500 horsepower would be worth more than $7,500.00 at evailing prices, and prices are going up fast.

Whether the use of the canal for navigation would conflict with use for power would depend entirely on how much navigation re was to be taken care of. If boats were passing very frequently, re would be quite a conflict, but not with one or two boats a day. lo not think there are enough boats run on the rivers in this ntry to seriously interfere with the power features of the canal. With reference to the navigation feature of the canal, if the con-ons in the river were such that boats could not get up with a inimal load, then it would not be practicable to put a canal there ess the river itself could be made navigable. The growth of ss, bushes, trees and shrubbery on the banks of a canal protects it. One or more of the cribs in the dam can be taken out and repaired nout tearing down all of the dam.

Redirect examination.

By Attorney General:

The Witness: I don't know anything about the crib dam having been repaired, large trees have grown up in the bed of the
97 old canal which was used in 1820 and 1850. I do not think that has any bearing on this case.

I do think the completion of the canal to Rocky Branch would, from the standpoint of generating additional electrical power, pay for the investment under present conditions and that it is an economical, as well as navigable possibility. It would offer an aditional power of nearly 60 per cent.; that is, it would be the difference between 8,500 and 14,000.

Redirect examination.

By Mr. Abney:

The Witness: The crib dam was constructed by the Trustees before the sale of the canal. I do not think there is any record or data that could give a definite life for such a dam. They might run from twenty to forty or fifty years, according to the exposure and the improvements made and the character of the dam and general conditions. I could only say it is not a permanent proposition.

The witness then testified over the objection of defendant, which was overruled that any one taking such a property must maintain the dam and that if it breaks, it is their duty to restore it; that power could not be furnished on the south side of Gervais street unless the dam was maintained so as to divert the water into the canal, and that the power at Gervais street would be diminished to the extent of the leakage through the dam; that he had not personally examined the dam and determined how much leakage there was, but if permitted to speak from discussion and from memoranda, could give a fairly good account, but from what he saw and his best information the leakage was about two hundred cubic feet per second; which, as an approximate statement, might be as much as five hundred horse power.

98 The Witness: The water gates at the north end of the canal have twelve openings, two gates to each opening, twenty-four gates. Possibly 30,000 horsepower of water could go through them, but it would not be feasible to allow that much because it would result in too great a loss of head. The gates are capable of passing all the water that the canal is intended to carry for power purposes—the openings are of good size.

I do not know how many gates they have in the power station of defendant, but I guess there are eight gates there.

The city has its own wheels, as the Columbia Mills has, to a capacity of 500 horsepower—that makes 1,000 horsepower.

The gates at the power plant of defendant are sufficient to take the whole development of the water power that would pass through the gates at the dam. There is a little accumulation of mud at the

gates of the power house, I suspect, but I think that the gates that are operated there are sufficient to take care of the water in the canal.

I know that below the last gate opening of the power house of defendant that the silt would naturally accumulate in a diagonal line across the canal. I have a map which shows the accumulation of this mud to the north of Gervais street. The channel to the water gates of the power station of defendant is maintained by the water passing through the gates, but below the gates the water eddies and sediment is deposited so that the end of the channel is pretty nearly filled up. I think that the gates to the wheels are clear.

They have six gates in use and two more for installation. With those two units installed, they would have a total installation of 11,000 horse power, including the 600 taken at the city waterworks and the 500 at the Duck Mill.

99 I made the survey last fall. In the fall of 1916 they were not getting the full power at that time because the river was low and the canal was low. I do not know how many gates were being used in November, 1916, and cannot say how much power was being produced.

If defendant should install the two additional units at this power station, they would have equipment for 11,000 horse power which they could get for a good portion of the year, but not the entire year. I did not take into account the failure to use those two gates in getting at the amount of power that could be produced. I derived that by the amount of water available.

I figured that 14,000 is the amount of power that can be produced from the entire flow of the canal if extended to Rocky Branch. If the canal was so extended and they took 10,000 at Gervais street, it would leave a little less than the difference between 10,000 and 14,000 at Rocky Branch. If you would draw 10,000 at Gervais street, you would have approximately 3,500 left at the end of the extended canal, under normal conditions.

It would take a very intricate calculation to determine whether it would be a profitable investment to destroy the power plant at Gervais street and develop the whole amount below. I think it very probable, with a close calculation, that it would be good business to take out the equipment at Gervais street and replace it at Rockey Branch.

My estimate, on a basis of 14,000,000 hours, which I think is very low, is that the revenue from the construction of a power plant down at Rocky Branch to take up the full power of the river would be $294,000, the net revenue per year, which is equivalent to 10% on three million dollars. I am not counting the destruction of the other power plant of the company because there would be no power taken at the present station under this hypothesis. The in-

100 vestment would only be about a million dollars, which would mean earnings of 30% net—the cost at the present time would be something in excess of a million dollars—next year it might be more or less—five years ago it would be considerably less—

the profits might be more than that if they would sell retail power. I do not know of many more profitable investments than 30%.

I estimate that one-fourteenth, or 7% increase in power could be secured by repairing and raising the old crib dam up there at Bull Sluice; that if they would raise the dam to the height required by the Act, it would increase their available power by 7%.

I have been coming to Columbia for twenty years or more and know the property. I have not observed any features in the outline of the old Columbia Canal that make it extraordinarily difficult either to develop it or to put it in a navigable and power-producing capacity.

Recross-examination.

By Mr. Herbert:

The Witness: The record of that dam up there that withstood the floods of 1908, 1912 and 1916 is a pretty good record.

You would expect to find mud down at the end of the canal next to Gervais street, below the last power house, in any canal in this country.

There are two bridges across the canal. I built one of them for the city for the waterworks. There was another bridge across it back in 1903, before defendant got it—one bridge was there before the defendant got the canal and the other was put there by the city.

In my estimate of cost I did not calculate what it would cost to get a right of way through the property down there. I presumed that it could be condemned as a public service corporation
101 at nominal cost. The land is of very little value except for the purposes of the canal.

If the river rises much more rapidly and higher down at Rocky Branch as stated by Colonel Lu Kesh, there would be a little more loss of power.

When I spoke of one million dollars to create a plant at Rocky Branch so that you would get 30% on your money, I did not take into consideration the cost of the existing canal from Gervais street up to the locks; this is the longest portion of the canal, but I don't think that the cost of that would be nearly so much as the cost below Gervais street.

Redirect examination.

By Mr. Abney:

The Witness: I have maps or plats showing the plan of construction, first, strictly according to the Act, which is not the best plan from an engineering standpoint, and I took advantage of the reading of the Act permitting deflections and laid out plans for other routes very much more economical and better in every respect, that is, for the completion of the canal from Gervais street down to the river.

(The witness then proceeded to explain in detail his plans for other routes, showing their economies and advantages—all of them including a lock at various sites. He estimated the cost of the canal and lock at Site A to be $823,500; at Site B, $521,000; at Site C, $487,000, and at Site D, $434,500,—these figures not including the power house. He estimated that the cost of the power house and equipment as of October, 1919, would be $430,000 additional. He stated that the cost from 1887 to 1892, and from 1892 to 1905 would be much less, possibly from one-half to two-thirds. These plans were introduced in evidence.)

The Witness: There was nothing to indicate the dimensions of the old lock down at Rocky Branch. I adopted for the size
102 of my lock the same size that the Government has adopted in the present dam, as I estimated that the dimensions selected by the Government were the best that we could get to meet the requirements on this river.

I am familiar with the rivers running into the Atlantic Ocean from the interior of North Carolina, South Carolina, Georgia and Florida. I cannot answer as to whether there are many, if any, waters superior to the Santee River for navigation, but I think that the combination of the Santee and Congaree rivers and tributaries renders them perfectly feasible for light draft navigation.

I have not estimated the cost of construction of proper locks at the northern end of the canal to meet the proper transportation up on Broad River. I do not know what size boats could come up Broad River. That would depend upon the further development of the river—upon what the United States Government does for Broad River.

Recross-examination.

By Mr. Herbert:

The Witness: My investigation showed that the canal could be run into the river further up than the point designated by the Act and still serve all practical purposes and save a great deal of money. I think the Act permits some variations from the line—it says a few yards above the mouth of Rocky Branch.

Redirect examination.

By Mr. Abney:

The Witness: The Act also contains the language: "Such deflections as may be necessary or desirable."

103 G. R. Le Kesh, white, recalled:

Direct examination.

By Mr. Abney:

The Witness: A canal, being stable, furnishes a better site for terminals than the bank of a river, which is subject to freshets. On a canal the terminal facilities, tracks, warehouses, etc., could be on one level and remain there, because the boats would always be on the same level, but on a river you would have to move the terminal down to the boats or the boats up to the terminals according to the variations in the stage of the water. Boats in a canal would not be subject to damage by freshets as they would in a river.

As I recall the dimensions of the proposed extension and other data given in the testimony, and assuming a fair labor market, with good river and weather conditions, and in view of the fact that a number of elements could be taken and prosecuted simultaneously, I think the job could have been completed within one year back of the 90's, but I would allow additional time for bad luck,—a little as regards weather, but mainly as regards labor conditions—I think eighteen months would be a reasonable time for the job.

During the years 1905 to 1916, inclusive, the time might be cut down somewhat on account of the use of steam shovels and other improved appliances, but my first assumption was based on a good supply of labor, and, therefore, I would be inclined to fix the time during that period as about the same, a maximum of eighteen months.

I include the construction of a power house within this time limit, but this would not affect the time limit because it could be constructed simultaneously with the other work.

I am a graduate of West Point and was assigned to the Engineering Corps upon graduation. I have been stationed in Ala-
104 bama and St. Louis, where I had the work all the way on the Mississippi River from the mouth of the Ohio, and I have been stationed in Charleston. I would say, just as a rough guess, that it would not cost over two million dollars to do that work according to conditions today. While it depends a little on the material, the average increase in cost during the period for the past fifteen to forty years would be around 80%. My figures are only rough figures, but 80% less than the two million dollars is approximately correct.

Cross-examination.

By Mr. Herbert:

The Witness: I said it would cost two million dollars to complete the canal down to Rocky Branch so that it would be serviceable to river navigation, together with the power plant. I do not think it would be a practical proposition from the power standpoint to do this even if it developed as much as 4,000 horse power.

For freight service—river navigation—you must have two ends to a boat line, some city to accumulate freight and another to go and deliver it. Georgetown is the only other point, so to speak, for a boat line on this river and has been for the last thirty years. Sixty or more years ago they used to take cotton through the Santee and Cooper Canal to Charleston, but nothing could go through it now. At the present time Georgetown has only one boat every two weeks connecting with other ports. This service from Georgetown is inadequate to build up much traffic on the Congaree—the deliveries of freight would be too infrequent.

The Waccamaw, Pee Dee, Black River and Santee rivers use Georgetown as a port. In times gone by all these rivers had thriving boat lines carrying traffic, but there is very little traffic on them at present—it has fallen off and fallen off until some of them have none at all. The Pee Dee River has no boats at the present time.

105 I think an occasional trip is made there. The Santee has had no traffic on it in two years or more. The Waccamaw now has one little boat as against several big ones it used to have—this condition on the Waccamaw has arisen since the railroad was built to Conway. I don't know about the Black River.

Q. Hasn't the government spent a large amount of money on the Waterce and there never has been but one boat up it?

A. I cannot say about that.

Q. Hasn't your experience on the Mississippi been that in spite of all that the government has done traffic has fallen off and has fallen off, and isn't that true all over this country?

Mr. Abney: We object to this testimony as being irrelevant.

The Court: I do not think it is pertinent to the issue. If a thing is navigable, it is not only navigable today, but for the future needs of the country.

Mr. Herbert: Plaintiff's counsel asked Mr. Ludlow if there was a better river in this whole section than the Santee, and he testified that for light navigation it is an excellent river. I am proving that river navigation all over this country is a thing of the past, and I contend that it is relevant.

The Court: I think not.

Mr. Lyles: Surely we can reply to the testimony of Colonel Lu Kesh and Mr. Ludlow which was directed to prove that if this canal was constructed, there would be terminals, etc., provided and navigation would be enhanced greatly; and we submit that such evidence is in response to the allegation of paragraph ten of the complaint, which is denied in the answer. We should be allowed to show that even if the canal was completed, there would be no terminals, etc., because there would be no demand for them and that there would be no development of navigation.

106 The Court: I rule that it is irrelevant to show that the river is not actually used in navigation. The question is whether it can be used. It is a physical limitation and not economic because economic conditions change with different years.

The Witness: You could not run one of those river boats up the Broad River as far as Parr Shoals dam. I think there are ten or a dozen shoals between here and Parr Shoals that you could hardly get over with a row boat.

You could not get a boat of any size through the sixteen-foot lock at the upper end of the canal. Broad River in its present condition is not navigable for boats that would be of any use from a commercial standpoint.

The main difficulties in navigation in the Congaree are down at Gill Creek and Congaree Creek, below the Government lock and dam. It can be navigated by boats of the proper draft except in very low stages of water. In extremely low water it gives three feet or a little less. It would be called a shallow channel, below the Government lock and dam, for a boat line on the Congaree. The channel is subject to be filled up with mud and sand, but not completely. When the river falls very rapidly the channel is in its worst condition, but not completely obstructed. The Government has kept a dredge there to pump out the sand and mud.

There are some snags in the river that will sink a boat—a great many have been removed. It is nearly two hundred miles to Georgetown. There are no towns along the way of any size to give any traffic to a boat.

It is true that water transportation at the present time, with the physical obstacles in the river, due to the high cost of labor and high cost of material,—speaking of rivers in general, is more difficult it has ever been in the past.

Redirect examination.

107 By Mr. Abney:

The Witness: The Federal Government maintains a snag boat on the Santee, and the present governmental project includes snagging only in the Santee.

There have been appropriations from time to time under which dredging has been done on the Congaree where the Government contemplates maintaining a four-foot channel. I know of no intentions to abandon the navigation of the Santee and Congaree rivers.

NIELS CHRISTENSEN, white, sworn:

The Witness: I am a member of the State Senate from Beaufort and have been since 1905, and am a member of this Canal Commission, familiar with its proceedings and the litigation now going on.

(The witness is asked to explain that paragraph of the Report of the Canal Commission stating that at one time it was supposed that for navigation purposes it would not be necessary or expedient to extend the canal throughout its entire length to Rocky Branch, and is asked to state why that statement was made. Mr. Lyles objected

because the Report speaks for itself and is free from ambiguity. Overruled.)

The Witness: That supposition was on the part of the Legislature, not on the part of the Canal Commission; that was before the Canal Commission was organized. The representatives of the corporation that control the canal came to the Legislature and represented to them——

Mr. Lyles: Under the Constitution the only way of proving the legislative action is either by the statutes or Journals of the respective Houses, and we object to any statement or negotiations to or with legislative committees.

108 The Court: Any statements to legislative committees by the representatives of defendant would be statements against interest.

The Witness: The corporation controlling the canal came before these legislative committees and stated that they felt it was not necessary for them to improve this canal channel while the United States Government was dredging the channel and suggested to the Legislature not to insist on the completion of the canal while the Government was trying to make a channel, which might be sufficient for improved navigation without the use of the canal. Members of the committee went to Charleston and discussed this governmental project with the Chief Engineer of the United States. This was the source of the supposition that for navigation purposes it would not be necessary to extend the canal. But there never was such a supposition on the part of the Canal Commission.

I have been a member of a number of legislative committees for a good many years and have been present at hearings a good many times when the representatives of the defendant appeared about this canal matter. I don't remember that these representatives ever denied the liability of defendant to build the canal from Gervais street down to Rocky Branch—their proposals were along the line that the Government was doing something and to wait a while and see if that would not answer the purpose and let them off from the completion of the canal.

(The Court rules that it is understood that defendant's objections already made continues to this line of testimony, but that the same are admissible as declarations of defendant's representatives.)

The Witness: The defendant's proposition was, when the Government work was completed, to join up the completed part of
109 the canal with the Government work by extending the canal through Gervais street. In a general way, they proposed to extend it to meet the Government improvements instead of building on down to Rocky Branch. I know where the Government dam is down on the river, but don't know how far it backs the water up. The proposition of the defendant was to complete the canal so that it would connect with that impounded water above the Government dam.

Cross-examination.

By Mr. Herbert:

The Witness: I do not know when the Government dam was completed.

Redirect examination.

By Mr. Lyon:

The Witness: All of the communications between the defendant and the Canal Commission were either in writing or were taken down stenographically and reported as a part of the minutes of the Commission. The last proposition of defendant that I recall before suit was brought was that to pay $75,000—I do not recall any proposition of defendant to complete the canal that was made before this suit was started. Defendant did make a written proposition to complete the canal in 1919 after the suit was brought.

THORNWELL MCMASTER, white, sworn:

The Witness: I have lived in Columbia for fifty-eight years and have taken a great interest in the Columbia Canal. In January, 1909, I first reported to the Judiciary Committee of the Legislature that defendant was not carrying out its canal contract.

(The Court ruled that the objection of defendant already made to any negotiations or representations with or to legislative committees continued throughout the testimony, but that the same were admissible as declarations of defendant's representatives.)

The Witness: I saw Mr. Herbert and Mr. Elliott frequently before the legislative committees. I never heard them deny that they were obligated to build the canal to Rocky Branch. They always acknowledged the obligation, but were trying to put something in lieu thereof. Their first proposition was to cut the canal back into the Congaree River at Senate street, about six hundred feet south of the present end of the canal at the north of Gervais street. The opposition to this claimed that the Government dam was a failure and did not accomplish navigation on the river.

In 1911 Mr. Elliott came with the proposition, in lieu of building the canal to Rocky Branch, to run an electric line from Columbia down to old Granby Landing, which was six hundred feet south of Rocky Branch, where the river boats landed, and to bring the freight up from that point on the electric line.

The third proposition was to put a dam about one hundred feet north of the city waterworks so that they would take in both rivers and turn the waters of both the Saluda and Broad rivers in and that they would dig the canal on down to Rocky Branch. I accepted it. I said, "I have no other fight against you."

I am a contractor in the line of waterworks, sewerage, railroad building, earth removing and dams. I did a great deal of work on the canal. I built all the gates. They had a dredge in the canal before the bridge was built to carry the city water pipes across, about twelve years ago. Before that time the dredge would go through the locks at the upper end of the canal every three or four months and work across the face of the dam above there, and it opened the sluiceway gates to let the mud and silt out. They could not
111 send a dredge up the canal after that. The dredge was to stir up the mud so it could be taken out by the water.

Above the crib dam 75% of the Broad River, for three-fourths of a mile, is filled with mud and silt.

Cross-examination.

By Mr. Herbert:

The Witness: I am positive that Mr. Herbert (representing defendant) was present, making the leading speech before the Committee, probably in 1910, and Mr. Abney was there on that occasion and on a good many other occasions on that same side.

The company had plans to build a big power station right up here at the city, but after the Legislature passed the Bill, they went up to Parr Shoals and developed the power.

Redirect examination.

By Mr. Lyon:

The Witness: I never heard Mr. Abney or Mr. Herbert down there representing the canal interest, deny that the obligation rested upon the holders of this canal to build it down to Rocky Branch.

Recross-examination.

By Mr. Herbert

The Witness: Mr. Herbert was down before the Legislature in the years 1910, 1911 and 1912, and Mr. Abney was there the same years and one year before. I am positive that Mr. Elliott was there every one of these years. Mr. Herbert and Mr. Abney appeared as attorneys.

112 Redirect examination.

By Mr. Lyon:

The Witness: I was down before the Senate Committee when they were considering the Forfeiture Bill in 1917. Mr. Elliott and Mr. Herbert were there. I never heard Mr. Elliott deny any obligation to build the canal down to Rocky Branch.

From 1905 to 1914 defendant got its electrical power from the canal and from a steam plant that they built about 1908, which was

a duplicate, meant to run during high water, when they could not use the canal.

Recross-examination.

By Mr. Herbert:

The Witness: If the mud was taken out of the lock in the north end of the canal, one man could open it. I thought that it was your (defendant's) job to keep a man there. Neither the State nor the county ever put anybody there to operate the lock.

Redirect examination.

By Mr. Lyon:

The Witness: They would have to move the old boat and mud before they could operate it.

H. H. GARDNER, white, sworn:

Direct examination.

By Mr. Lyon:

The Witness: I am a Certified Public Accountant and have made a summary of the earnings of the defendant company for the years 1906 to '14, inclusive.

113 Including dividends paid on the preferred stock, the net earnings of the defendant during that period were $1,160,685.11.

The assets and liabilities as of December 31, 1914 were $6,714,943.41.

There is nothing on the books of defendant to show the value put on the canal itself. The power construction account, under which I suppose they carry the canal and all kindred construction, is $1,982,462.46.

Cross-examination.

By Mr. Lyles:

The Witness: The figures I have given include the entire operations of the company. The surplus of $750,000, which I have given, does not include any charge for depreciation as none was made by the company. Depreciation is a proper charge according to good bookkeeping and is allowed by the Federal Government against the income tax, especially since the Federal Government income tax I have noted depreciation accounts. It is a proper charge against the surplus account and this surplus would be reduced by the proper amount chargeable for depreciation during this period—1906 to 1914. The reserve you would create for the depreciation would be an amount kindred to surplus, in that it was an amount or segrega-

tion of the surplus account for the benefit of the stockholders in restoring to them the original cost of the property. I do not know what percentage should be properly charged off on a property of this character for depreciation, as I have never audited the books of a public service company.

During this period defendant paid no dividends on its common stock. The dividend rate on its preferred stock was 6%.

111 L. A. CHITWOOD, white, sworn:

Direct examination.

By Mr. Abney:

The Witness: I am forty-five years old and have been living in Columbia for about six years and am in the contracting business. I was formerly a steamboat master. I commenced as assistant to the pilot in 1895 on the Chattahoochee, Apalachicola and Flint rivers and then went to the Tennessee River for the period of five years. The Tennessee is a tributary of the Mississippi and runs through the whole State of Tennessee. It is something like five hundred miles long. There I was assistant superintendent of the lock and dam near Chattanooga. I had to have a Government license and have held one for twenty-two years. I came from Tennessee to Columbia. I have been over a good many other rivers. I brought a steamer down the Ohio and Mississippi and took one down the Apalachicola. I worked for the Dam Company in Augusta. I came to Columbia in 1913, worked at Parr Shoals for about thirty days and then went to work for G. A. Guignard on a river steamer as master. He was president of the Columbia Railway and Navigation Company, doing business between Georgetown and intermediate points to Columbia. At Columbia we landed at Granby Landing part of the time and part of the time we came to Gervais street. I was master and pilot of the boat and had a Government license. I have been over the Waccamaw, Santee, Congaree rivers and Wynyah Bay in this State; over some of the streams of Georgia and over the Cape Fear River, in North Carolina, and the James and Appomattox rivers, in Virginia.

From my knowledge and experience I would not think that there is any other interior stream more susceptible of navigation,
115 and the improvement of it, to increase the business on it, than the Santee and Congaree. There is no greater hope to increase the amount of business upon any of the rivers that I have mentioned, under the appropriation of Congress, if properly attended to, than the Santee River.

The Santee River would be much better if it had the use of the full water shed above Columbia and the full flow was permitted to go into it. I think you would have a better show all the year round on this river than you would have on the Ohio or Tennessee. I have found these shoals in the Ohio. The boat I bought in 1905 had a hole knocked in it coming down the Ohio, drawing three feet

of water. Most of the rivers have these obstacles, and lack of appropriation by the Federal Government to remove snags and shoals in the Congaree River permits them to accumulate. It is only necessary for the Federal Government to proceed with its former policy and clean them out, to keep an unobstructed channel. I don't know that Congress stopped its appropriations just before the declaration of war with Germany.

I worked three years on the river. The length of time it would take to clear up that channel would depend upon the amount of permanent work they would want to do; but during my experience I had very little trouble except at Move Station and Gill Creek until this water was cut off. We met with few obstacles except at Move Station, fifty miles below here, where they had a draw bridge on the wrong side of the river. The Government changed the bridge to the other side of the river. We had one other obstacle that gave us some little trouble at Gill Creek—this was a sand accumulation of one hundred to two hundred feet. The Government had a dredge boat in and out pretty nearly all the time it was needed. All
116 the time that I was there, there was a dredge boat on the river, but it was not at work all the time.

Mr. Guignard had three light stern wheel boats. My first trip down the river was in September, 1913, and my last trip on a Guignard boat was in 1915. In 1916 I was on the Carolina Veneer Company's boat. When I went with the Navigation Company (Guignard's) they had three boats a week, but they were just about running one boat a week when I left. There is no boat line in operation now.

There were a good many causes that lead to the stoppage of the boat lines on the river, but I understand the original cause was on account of the taking off of the boats during the war, at Georgetown.

After the war was ended, I understand that they have boats into Georgetown now once ever- couple or so weeks. One of the boats belonging to this company was pretty well broken up by the low water before I quit work for the company. The other one has been standing at Granby Landing for three years.

Along about May, 1914, as well as I remember, the Nan-Elizabeth, one of the Guignard boats, sunk just below Move Station and Mr. Williams, vice president of the company, ordered me to take the Ruth No. 2, down to get her freight, and on account of the condition of the river being so low from what we considered Parr Shoals——

Mr. Lyles: We object to that. There is no allegation in the complaint alleging that Parr Shoals had anything to do with breaking up this boat line.

The Witness: We had very low water and on account of that we struck a snag at Gill Creek and virtually wrecked the boat.

Q. Do you know about when the dam at Parr Shoals was constructed?

117 Mr. Herbert: We object to that; there is no allegation as to Parr Shoals.

The Court: It may affect in some way the navigation of the river.
The Witness: About May, 1914.

The accident to Ruth No. Two was after that, a good long while—I don't remember just the month. The time we began having trouble on the river was during the month of May after they impounded the water at Parr Shoals.

(Mr. Lyles objected to this testimony as to Parr Shoals because there is no allegation covering it and it is irrelevant. The Court overruled the objection, but ruled that the objection is a continuing one to all such testimony.)

The Witness: I went with the boats in September, 1913, and from then until May, 1914, there was very little trouble. This company had three boats and from the time I went with them up to the time we had trouble in May, had a better showing than most any other boat line I know of. They handled various sorts of commodities—better than you hardly see on any other rivers. We averaged a trip a week and handled around one hundred tons of freight on a trip up, and usually had local freight down and through freight, and sometimes we would pick up freight on the down trip. We were carrying from 225 to 250 tons coming up on three feet of water—on high water we would bring a little more and low water a little less. The freight charges would run something like on an average of five to six dollars per ton. Sometimes it would run from one thousand to fifteen hundred dollars per week—on some of the trips four or five hundred dollars, maybe not so much. The business had increased so rapidly that there were thousands of cases of goods hung up in Georgetown so that we had to put on a system of lighters, and about that time they finished Parr Shoals and we were put out of 115 business. During December, when I left the company, the earnings were virtually one hundred and fifty to two hundred dollars per week—thirty or forty tons of freight. I should think the boat I was on before the trouble came was taking in around twenty-five hundred to three thousand dollars per month. After July and August, 1914, I made a trip on the Ruth which took nearly six weeks. We only ran one-half mile at the time. I supposed it was caused from Parr Shoals.

It would be worth thousands of dollars to the shippers on the boat lines to have the canal completed and the terminals. We had a haul of nearly two miles from Granby Landing at considerable cost, and more or less breakage.

If we had the terminal facilities on the canal and connection with the lines of railroads, it would be of great benefit, saving the handling and breaking of the goods.

The Government dam was completed in 1914 and I think I took the first boat as far as Gervais street in the Government pool in December, 1915. We didn't have any trouble. We went up to the foot of Gervais street. We followed the channel that had been blasted in the river, but we could not follow it without the water being raised by the dam. The dam backed the water all the way

up to Gervais street, but we landed at Senate street. We had a cargo on the boat and a lighter; the boats turned in the pool. I left just at that time and another captain took my place, but I came back to work in 1916, and we used the channel as far as Tobacco street for about a year. When they worked the dam properly, you would have something like three to three and one-half foot channel all the way to Gervais street. We considered a navigable stream two and one-half to three feet. Four feet was more than we needed for the boats we had. In the fall or wet season, we could use a boat on the Congaree and Santee almost drawing five feet. It was very seldom we could not use a boat without some disturbance of
119 the natural flow of the channel drawing three feet. That boat would carry one hundred and fifty tons, and with a lighter, one hundred and fifty to two hundred tons on three feet of water.

If the Federal Government kept up the channel on the Congaree at four feet, and we had a four-foot landing on the canal terminals, that would increase the business about one-fourth. I usually found the Government locks in pretty good condition, and usually found the channel in pretty fair condition, with the exception of filling with sand that had to be cleared out. The Government had a dredge during most of the summer months during the time that I worked there, starting in 1916.

The company built a big warehouse at Granby Landing before the Government locks were finished, as well as I remember. They were to build a new warehouse at Senate street after the locks were finished. I could not say if it was built. You could have built a warehouse at Rocky Branch, but it would have been in a worse place than the one at Granby. The company endeavored to connect a spur track from the Granby Landing with the railroads, but that proved a failure.

Cross-examination.

By Mr. Herbert.

The Witness: Our crew consisted of a captain, who also acted as pilot and mate, a chief and assistant engineer, two firemen, one cook, and from four to twelve deck hands,—generally about six. We used a crew of about thirteen or fourteen. The first part of the time I was here we ran pretty well at night, but the last part we didn't have much business and only ran in the daytime. The captain got $100; the mate, $90; engineer, $90; assistant engineer, $60; firemen, $15; cook, $20, and deck hands, $18 to $20 per
120 month. Deck hands would cost now from $3.50 to $4 per day, or about $100 per month. I think it would cost now about three times as much to operate a boat as at that time. A cook would now get $4 per day; fireman, $125; engineer, $250; mate, $200, and captain, $300. I don't know how much the rates have gone up on the freight as I have not handled any since I left. These wages began going up about 1915.

We could go to Georgetown with a double crew in about twenty hours,—without stopping at night. With a single crew, it took the best part of two days. We could come back in about forty eight hours. One trip a week was pretty good work. We used about thirty-five cords of wood on the trip, which then cost $1.50, and is now costing $5.00.

The last cargo left Georgetown on the 6th day of July, 1918. I was not with the company at that time. I haven't had anything to do with river navigation since July, 1916. I was with the Veneer plant from July, 1915, to July, 1916.

The Government dam was completed along about November, 1915. I carried the first boat up in it about December, 1915.

Mr. Guignard was president of the Navigation Company, and Mr. T. C. Williams was vice president and general manager.

The last trip I made we came up to Gervais street. They never had a warehouse up there to my knowledge, although they expected to build one there at Senate street. The warehouse at Granby has never been washed away. It is above high water.

Moye is about five miles above the junction of the Congaree and Wateree—about fifty miles below Columbia. The draw on the rail-
road bridge was on the wrong side of the channel and the
121 railroad changed it so as to make it better for the boats.

We began to have trouble in 1914—the latter part of May, but I never kept up with the dates, and after that we had trouble along in August and September—worse trouble in August laid up above Moye for three weeks; could not get over a sand bar. So far as I know there was less river in the summer of 1914 than ever in the history of the State,—less than I have seen since, but I had never seen it before. The records of the company would show the dates of the trouble, but I have no records and cannot give them.

Mr. Guignard and Mr. Williams had charge of the boat line then. They had reorganized and started over again some eight or ten months before. They had bought in a boat line that had busted after running three or four years. They got some new boats and started over again.

They consulted me about testifying in a suit for $200,000 against the Parr Shoals Company for this condition, but so far as I know the case has never been tried.

I don't know whether the boat line carried 3,631 tons of freight in 1913 or 4,324 tons in 1915. I think they handled more freight in 1915 after the Parr Shoals dam was completed than they did in 1913, because they were operating three boats in 1915 and only one in 1913. There was less water in the river from May to September, 1914, than I have ever seen since, but I had never seen the river before that time. I suppose that we carried something like six thousand tons of freight in 1914, which was more than we carried in 1913 or 1915, because the three boats were making trips and had lighters.

The Nan-Elizabeth boat was sunk about Pleasant Hill before Parr Shoals was ever heard of, and other boats were sunk, and one was burned up. We lost boats quite often.

122 I have heard that there were a good many dams, both on the Saluda and Broad River above Parr Shoals. I did not notice when at Parr Shoals whether the water fluctuated or not as it came there. I don't know much about the classification of the freight we carried or revenue, because we had clerks and bookkeepers who attended to this; I never did pay a great deal of attention to that.

The channel in the Government pool above the dam was a narrow channel on either side of the river which was on an average of three to four and one-half feet of water. We had just barely enough water to run there, but operated in there on about four feet of water with a lighter and boat.

The Veneer plant burned down after I left. They got in pretty bad financial shape.

Redirect examination.

By the Attorney General:

The Witness: We did business on the river in the face of a great many difficulties; I don't know whether it paid or not. I never did have any statement showing the cost or the earnings. I should think that we were making pretty good earnings each month from my experience operating boats. I would think it would be a money-making proposition.

If the Government would fix the channel in the river and take out the snags and sand bars and give you a clear waterway to the coast, and the canal was built and the terminals put in, I would like to have a steamboat line on the river—I think it would pay all right.

Recross-examination.

By Mr. Herbert:

The Witness: The boats and other equipment and warehouses that the Navigation Company had must have cost about $40,000.

123 The James River, between Norfolk and Richmond, both cities of about one hundred thousand inhabitants, has about thirteen feet of water at the dock at Twenty-eighth street in Richmond, and then locks on up to the city. Georgetown has about twenty-five hundred people.

The Mississippi River has a channel of something like twelve feet at times. I brought that boat down in 1895 and we grounded in the Mississippi drawing three feet, and two other boats grounded at the same time in September, and in the Ohio we grounded with nothing on the boat but fuel.

I have been told that the traffic on those rivers has declined very much in the last few years. I don't think that the snags and shoals, and one thing and another, have had as much to do with the decline in river navigation as railroads, because whenever a railroad hits a

river there is a decline. Before the era of railroads all the rivers carried a considerable amount of freight—the Mississippi and the Ohio and all those rivers, and it has greatly fallen off since that time.

I have seen traces of the old canal through which they used to get cotton to Columbia, and when the railroads came, all that was abandoned.

Redirect examinaton

By Mr. Abney.

The Witness: I have been on the rivers about twenty-five years. I don't know beyond that time, but since that time the decline in river navigation has taken place when the railroad era was entered upon. It has been the purpose of Congress and of the States and of the commercial bodies of the citizens of the country, especially within the last fifteen years, to develop the interior waterways of the United States. My idea is that most of our citizens are very much in favor of holding navigation open. They can get better
121 freight rates even if they don't run their boats. I find in our road building it is almost impossible to get material at present, and the railroads are complaining of not being able to supply sufficient and quick transportation. It has always been my observation that the development of our interior waterways reduces railroad rates.

Recross-examination

By Mr. Herbert:

The Witness: In spite of all the Chambers of Commerce, and in spite of all that Congress can do, and all the public can do the traffic on the rivers has been going down for the past ten years. A box car carries around fifty tons of freight and a railroad train will carry fifty or sixty cars, which would be about three thousand tons at one trip. I don't know whether one railroad train, in one day, can bring up as much freight as a boat on a boat line did in a whole year, but if you take the right kind of boats on this river, you can bring up as much as one thousand tons per week.

It has never been done, but it can be done. At Gill Creek you have only a variation of five or six inches with the exception of when it is interfered with from other causes; and you could take your lighter—a light boat—and load the boat up 63 or 70 tons and come on it. You would have to unload from a boat to a lighter at Gill Creek, like that line on the Chattahoochee River.

If you ship freight by this boat line, you have to load and unload it several times, whereas if you ship in a box car, it only has to be loaded and unloaded once wherever it is going.

Question by the Court:

Q. What is the difference in the amount of capital necessary to operate a boat and to operate a railroad?

125 A. It would be millions of dollars. You can operate a pretty good boat line on $50,000 that would move one thousand tons of freight from Columbia to Charleston or Georgetown per month.

Recross-examination.

By Mr. Herbert:

The Witness: The cost of all these river improvements comes out of taxes collected by the Government. The railroad build their own roads. The Government has spent all told over a million dollars on this river here.

Redirect examination.

By Mr. Abney:

The Witness: All of the expense of running the railroads comes out of the pockets of the people.

THOMAS B. LEE, white, sworn:

Direct examination.

By the Attorney General:

The Witness: I formulated the plan for the State Penitentiary after the Civil War, and it was built on the banks of the old Columbia Canal. There were boats then coming from the Broad River into the canal, and I used the waters of the canal to bring rock out of the quarry.

The Board of Directors of the Penitentiary later ordered me to make plans and specifications to build this canal of the dimensions given from Bull's Sluice down to Gervais street. I undertook the work and determined the dimensions of the canal to utilize the waters of the river. These were 110 feet at the bottom, 150 feet at the surface of the water and the water eleven feet deep, with a fall from Bull's Sluice, where the head gates were located—a dis-

126 tance of two and seven-eighths miles to Gervais Street, or five-tenths of a foot in each thousand feet, or a little over one-half a foot. In a mile we got a velocity of water in the canal of — second feet. The water moved at the rate of two feet, seven inches to the second. We got a fall of 33 feet on the north side of Gervais Street. The low water elevation there was plus 118, and on the south side of Gervais street was plus 117, which means 117 feet elevation above mean tide of the ocean.

Parr Shoals is a very well constructed affair, a dam about one thousand feet long, thirty-nine feet high, with a pond of 15.4 square

miles area and some twenty-five miles long. That plant, if properly maintained, would yield to the Columbia Canal a flow all the time of at least one foot per second per square mile, and there would be no occasion there to shut off the water.

(Mr. Lyles enters the same objection to any testimony as to Parr Shoals as being irrelevant and not alleged. The testimony was taken subject to such objection overruled.)

The Witness: We consider Parr Shoals a very valuable property, and very valuable asset to the Columbia Canal, if properly managed.

I built the Columbia Canal on certain dimensions, which I fixed myself, within one-half mile of the head gate. Mr. Holley finished the work and built the head gate and the dam. He did not build the dam on my plans. The work is thoroughly constructed with an effectual protection against flood waters, if it is properly maintained. I know from my own survey that the west banks of the canal down to the old Geiger Mill are all ample to handle any water and meet any floods that we had then, and I have since ascertained, any floods that have come since then. From that point down the banks
127 are very high and settle very much. They are not high enough now and the full power cannot be obtained until they are raised higher. My idea to rehabilitate this property is that there should be a concrete dam built across the river and that the banks should be raised from just above the waterworks down to the Gervais street bridge. This work would cost $130,000.

(The witness then went on to explain at some length some differences between his judgment and that of the witness Ludlow as to the best plan for completing the extension of the canal from Gervais street to Rocky Branch.)

The Act of the Legislature of 1870, I believe, requires that the canal should be 150 feet wide at the surface, 110 feet in the bottom, carrying 10 feet of water. This was a revision of the canal I built for the Directors of the Penitentiary and contained a fall of 37 feet at the south side of Gervais street. This raised that grade 3 feet above the grade we had made for the Directors of the Penitentiary and gave three feet more fall. That heighth has been carried down to the terminals near Rocky Branch and gives 14,000 horsepower of water. I should say that the size of the canal was to carry 16,000 horsepower there and it will in the future, if built on those lines, and the dam is built as I have indicated, which will carry 16,000 horsepower of water, but taking it as it is, it would be 14,000 horsepower of water.

(The above testimony was received in narrative form under an agreement that any objection thereto should be presented and passed upon after the narrative was over. At this point Mr. Lyles stated that the deed from the Board of Trustees of the canal to the Columbia Water Power Company, defendant's predecessor, contained a recital stating that the acceptance thereof and payment of the consid-

eration thereunder by the Water Power Company, or George
128 Wallace, its assignor, was conditioned upon the certificate of the completion of the canal to Gervais street by Mr. Byron Holley, the engineer of the Canal Commission, and that the deed recited that such certificate of completion to Gervais street had been given, and that therefore the State was now estopped from any contention that the canal was not completed to Gervais street, having authorized the Board of Trustees of the canal to make the deed by the amendatory Act of 1890. Mr. Lyles stated if there was anything in the testimony of the witness that contradicted such recital, that he objected to it; that it was impossible to hear the witness and catch all that he said. The Court ruled that he did not see anything in the testimony along that line that was to be excluded.)

Direct examination resumed.

By the Attorney General:

The Witness: There are 11,100 feet of the canal to be completed from Gervais street to Rocky Branch. Under ordinary circumstances I would be willing to give a contractor twenty-four months to do this. If the necessity arose, it could have been completed in eighteen months. Twenty-four months would be maximum unless some emergency arose during the construction and then he would be entitled to an extension of time. There are no insurmountable obstacles to the completion—about 10,000 yards of rock to remove and 440,000 yards of earth excavation. The excavation is of easy character—a great deal of loam and little clay, but no difficult work at all.

I would like to recur to my remarks about the Columbia Canal. I cannot state it from my own knowledge but the central line of the canal is remarkably free from silt. The water has its greatest velocity in the middle of the canal but the velocity diminishes on the sides and the silt goes down the center line and accumulates at the
129 lower end. Certain depressions in the bed of the canal have been filled up.

Assuming Mr. Ludlow's figures of quantities to be correct, the work, according to present prices, would cost about $1,630,440.00. Between 1905 and 1918 it would have cost about one-third of that.

If a lock or other device is built on the Congaree River to get over those six miles of bad river from Rocky Branch down, it would afford a navigable waterway from the coast to Columbia. My opinion is that the river should be built for slack water navigation—dams built along so as to get the heighth proper for the depth, which would give a depth of five feet. When you reach the mouth of the Congaree then you would have a river eight to twelve feet deep all the way from Ferguson, fifty miles further.

The Santee drains 14,850 square miles and has an average flow of about eight-tenths second feet to the square mile.

I think it is entirely practical in my observation to build slack water navigation on the Congaree after this extension to Rocky Branch is made, and then from the mouth of the Congaree to a point

three-quarters of a mile below Ferguson, when they develop the proposed Santee-Cooper Canal to carry a six-foot fall of water and cut off 72 miles of the distance.

Jury Sent to View Locks.

At this point the Court sent the jury to view the premises.

Cross-examination of Witness T. B. Lee.

By Mr. Lyles:

The Witness: The work that I did started at Gervais street and dug up to one-half mile from the locks. I started this work
130 in 1885. This work was done under the Board of Directors of the Penitentiary before the Act of 1887 was passed.

The dam across the river was built by Mr. Holley, the engineer of the Board of Trustees of the Canal, about twenty-eight years ago, and he also built the locks and water gates up there.

The city waterworks have always been on the canal; they were on the old canal for a long time, and after the new canal was put in operation, they were moved to where they now are. They have been operated by the waters of the canal since prior to 1890.

I could not say that I recollect when the Columbia Mills built its hydro-plant down there on the canal. I was not here when they built it. I saw it after it was built, on a visit to Columbia. I do not recall the exact time. It was not one of the first hydro-plants constructed in the country. There were hydro-electric plants established long before that on the Seneca River.

Q. What about the hydro-electric plant of this company the one that was built by the Columbia Water Power Company and transferred to this company, do you know when that was built?

A. No sir, I wasn't here after 1885, and there was a cessation of work there, and an attempt made to raise money by the city of Columbia, and I didn't know the process.

When I finished the work that I did on the canal in 1885, the electrical transmission of power was not in use. The question arose that when the canal was being operated how shall we handle this power. The German method on the Rhine was thoroughly studied and others, and the conclusion was reached that the power would have to be carried into the towns by ropes or wires. At that time the idea was to put mill sites between the canal and river
131 and run the water from the canal through the wheels of the mills into the river. Things then were in a very primitive condition as compared with the present. You could, if necessary then, use 10,000 horsepower of waterpower at one point, but you would not then have had use for 10,000 horse power in one industrial plant, and the idea was to put the plants along between the canal and the river and take off as much power as was needed at each one.

The last cotton brought, that I recollect anything about, down the Broad River was before there was any attempt made to widen

the canal. That was after the Greenville railroad was built up the Broad River. But before the Columbia, Newberry and Laurens Railroad was built. These boats could come down the river on a fresh river; Bookman's Shoals, between here and Parr Shoals, was the only obstacle.

I went down the Congaree River this year (1920) in a boat belonging to the Columbia Railway and Navigation Company, which was equipped with a crew, provisions and everything. Mr. T. C. Williams and another engineer, and an engineer in the employment of Mr. Black, chief of engineers; the captain of the boat and two or three boat hands.

Redirect examination.

By Mr. Abney:

The Witness: I stopped the work I was doing in 1885 and did not do any work under the Act of 1887. I did not drive a stake south of Gervais street. I don't recollect that the canal, south of Gervais street was used to carry cotton down to Charleston as late as in the '70's. The boats that I saw bringing cotton down Broad River was before we commenced work widening the old canal. These boats discharged at Geiger's Mill.

132 We had a very large quarry at the Penitentiary, a large quarry below Gervais street, and one on the other side of the river, all large quarries being worked, and Mr. Guignard is carrying on one the other side of the river, a very extensive brickyard. There is an abundance of brick clay along this canal.

There is plenty of brick clay along Broad River, and also granite. Unquestionably, the best method of transportation of brick and granite is by water in flat boats that do not draw more than two feet of water and no transfer of freight.

Recross-examination.

By Mr. Lyles:

The Witness: I do not know how long it would take the boats to come down from Union. Fresh water would run in the vicinity of three miles an hour and a boat could travel four or five. By fresh water, I mean a medium flood, which would be about three months in the year. I don't know how long it would take a boat to go back up Broad River. They could not go more than two miles or maybe three miles an hour with a good crew. Probably these boats did often have to wait at Geiger's lock for sometime, waiting on the river in order to get back, but I could not say.

The locks that are now in the river at the head of the canal were built by Mr. Byron Holley. At the time of the passage of the Thompson and Nagal Act, in 1879, there was great excitement and pressure brought to bear on the Legislature to pass the Act. The plea to the Legislature was to develop our waterpower and develop our industries, and against that the argument was, we are giving them

too much for nothing. The financial and industrial conditions in Columbia at that time were very bad.

133 N. E. DERRICK, white, sworn:

Direct examination.

By Mr. Lyon:

The Witness: I am a certified public accountant and have examined the books and accounts of the defendant, among these were some reports made by Highley & Company—nine in all—and introduced in evidence, and determined the net profits from the point where the witness, Gardner, left off. On January 1, 1917, the net profits of this company were $1,347,877.77. The net earnings to December 31, 1919, were $1,588,147.66. In ascertaining the net profits there was an allowance for depreciation for only two years, 1918 and 1919, of $396,400.00. Their net profits were $1,550,000, and they set aside in addition to that $390,000 and some odd dollars for depreciation; that is approximately correct. I gave the figures.

I found that there have been certain charges against their surplus or earnings which reduce the amount of their surplus on their books. One of the charges: Parr Shoals Company, $168,077.51. These were notes given by the Parr Shoals Company to defendant. This reduced the surplus so much and defendant received nothing in return so far as the books show. On the Parr Shoals Company construction account an item duplicated of $71,602.58. This was charged off against this defendant. There were $70,000 bonds of the Parr Shoals Company cancelled by the defendant out of this surplus. In addition to the $168,077.51 worth of Parr Shoals notes there was $23,500.00 cancelled, making all notes so cancelled something over $191,000.00. The books show that these notes were just written off the books of the defendant in favor of the Parr Shoals Power Company. In addition to that there is another small item of other securities, Ridgewood Amusement Company, of
134 $2,000.00, which is included with the $168,000.00, the notes, and the $71,000.00 duplicated item, making a total of $241,680.09. This was written off in one item in 1917. Add to the above the $70,000.00 of the Parr Shoals Company bonds cancelled and it will be $311,680.09. Other Parr Shoals notes, $23,500.00, written off and added to the above makes $335,180.09. The above items were obligations of the Parr Shoals Power Company to the defendant and were eliminated from the defendant's profits by charging off.

Dividends on preferred stock have been paid to the amount of $599,176.00 and on common stock $75,000.00 and depreciation account to the amount of $396,400.00. If the above were added to the net profits would show the sum of $1,984,547.66. The books of the defendant do not show what became of the money set up in the depreciation account. That is simply that amount of surplus has been set aside.

Among the papers of the defendant, I found some contracts which

were transferred by the Columbia Water Power Company to the defendant in 1905. It appears that there were ten contracts so transferred. There may have been some contract I did not get. They were set off on the books in account form at the time of the transfer in July, 1905. The total gross earnings from the contracts July 1, 1905, to December 31, 1905, was $33,682.64. Contracts for 1906 with a couple of additional ones showed gross earnings $85,481.43. The gross earnings for four months and twelve days, from August 20th, 1917, to December 11th, 1917, from the power department of defendant was $162,210.36. From August 20th, 1917, to May 31st, 1920, the total gross earnings were $1,470,839.98 for the same department; the net profit during this period was
135 $406,048.35, after deducting $1,064,791.63, the expenses during that period.

Defendant has outstanding bonds of $3,125,000.00 and $70,000.00 additional bonds in the treasury.

Outstanding common stock, $2,000,000.00—20,000 shares at $100.00 per share; preferred stock 8,940 shares, or $849,000.00 worth.

Mr. Lyon offers in evidence indenture from the Columbia Electric Street Railway, Light and Power Company to Mercantile Trust and Deposit Company of Baltimore, trustee.

Mr. Abney offers in evidence, first mortgage and deed of trust from Columbia Railway, Gas and Electric Company to Knickerbocker Trust Company, trustee, dated July 1, 1911; and,

First mortgage and deed of trust of Parr Shoals Power Company to Columbia-Knickerbocker Trust Company, trustee, dated August 1, 1912.

Mr. Lyles objected separately to the introduction of these exhibits upon the ground that they were entirely irrelevant under the issues made in the pleadings.

The Attorney General argued that the testimony was relevant, if for no other purpose than to show that the company has had every opportunity to complete the canal from a financial standpoint, as well as from every standpoint, and that then the question would be as to whether or not forfeiture should be adjudged under the decision of the Supreme Court.

The Court: "Yes, sir; as Chancellor."

Mr. Lyles: I just asked your Honor to note that counsel recognizes the difference between the two issues which we have laboriously argued since the case started.

136 (The objection of defendant was therefore overruled and the three papers above referred to were received in evidence as Exhibits 16, 17 and 18, respectively. See appendix.)

Mr. Abney: Offers in evidence the operating argument between the Parr Shoals Power Company and Columbia Railway, Gas and Electric Company, and states: We contend that this agreement makes the Columbia company lessee of the whole property and that it has, by virtue of this control, transferred the old contracts which

the State had to that particular company, mingling the whole estate, and we so contend that they are one and the same company, and, probably, if we find it necessary, contend that it is absolutely contrary to the statutory law of this State and invalid.

Mr. Lyles: We object on the grounds that there are no such allegations in the pleadings.

The Court: I will admit it.

The agreement was received in evidence as Exhibit 19. See appendix.

On July 27, 1905, there were $675,000.00 of defendant's bonds outstanding besides $200,000.00 of the canal bonds. On July 8, 1907, their bonds had increased to $2,000,000.00.

Cross-examination.

By Mr. Lyles:

Bonds bore five per cent per annum. Preferred stock dividends were six per cent. $75,000.00 dividends paid on common stock during the three years, 1917, 1918, 1919. No dividends on common stock from 1905 to 1917. In 1917 the dividends on common stock were $5,000.00; in 1918 either $30,000.00 or $40,000.00; in 1919 $30,000.00; a total of 3¾% during the three years. Above items have been charged off against surplus. It appears by the books that the Columbia company operates the Parr Shoals Power Company just like it was rented; they took the profits and paid the
137 losses. Parr Shoals Power Company bonds bore five per cent; preferred stock six per cent. Found no dividends on the Parr Shoals Power Company common stock. Parr Shoals is run as one of the departments on the defendant's books. I find a depreciation charge for two years, 1918 and 1919. Prior to that time there was a small amount of depreciation charged off, about 1905, 1906 and 1907. At a later time I find that was credited back to the surplus account. No depreciation worth while until 1918 and 1919. I note by the books of the company that the defendant has made a great many extensions and improvements in all lines of work.

Redirect examination.

By Mr. Lyon:

I am not exactly prepared to say, without looking at the books, whether there is any evidence on these books that this common stock upon which they paid dividends actually brought money into their treasury—or whether they actually got any money for that stock or not. I remember an item of $2,000,000.00 of common stock of Parr Shoals. There is no evidence on those books that a single cent went into Parr Shoals for that. The Columbia Railway, Gas and Electric Company has this stock. The $396,000.00 depreciation that has been set up its simply a method of keeping books. It is necessary for them to earn that before they can set it aside. It may be saved for

a future day or invested in some improvement as desired. I did not find any entry on the books which shows that they have built anything on the canal or improved it in any way; but I did not examine, of course, every item on the books.

Bonds and stocks of the Parr Shoals Power Company are not carried in the interdepartmental accounts of the defendant. Parr Shoals Power Company has issued $3,000,000.00 of bonds—
138 ascertained that from the amount of interest being paid. The earnings of the Parr Shoals Power Company appear as follows:

For 1914, deficit of $42,145.70.
For 1915, earned $35,358.05.
For 1916, earned $40,930.51.
For 1917, earned $50,301.37.
For 1918, earned $1,560.77.
For 1919, earned $6,634.26.
They charged depreciation off in 1918 and 1919.

Q. How much did they cut off of that pond and dam for depreciation?

A. $112,000.00. Don't know how they reached that $112,000.00. When asked, that happened to come along after these Federal taxes, witness replied: Yes, sir; that is during the Federal tax period. So when they were not charging or not setting off all this depreciation their net income was rather high. There is a tax on net income, and the lower down they get it, the less the tax, so they started to charge off depreciation.

Recross-examination.

By Mr. Lyles:

If Parr Shoals dam washed away, and the company had not set up depreciation to replace it, it would be in a pretty bad shape. When depreciation is set up correctly it is a proper charge. Depreciation based upon actual amount paid out by any concern is a proper charge. I do not know what consideration moved the Parr Shoals Company to issue the $2,000,000.00 of common stock.

Redirect examination.

By Mr. Lyon:

The common stock that was issued by the Parr Shoals to this company, and is charged to the account, rights, privileges
139 and franchises. For rights, privileges and franchises, the Parr Shoals Company issued the Columbia Street Railway Company $2,000,000.00 worth of stock, which is indicated on the books.

Cross-examination.

By Mr. Lyles:

If you want the right to put your dam and flood 100 acres of a man's farm, you actually have to pay for it.

Redirect examination.

By Mr. Lyon:

So far as I have been able to ascertain there is not the slightest evidence in those books that this street railway paid five cents for that stock. It gave no value for it whatever.

Cross-examination.

By Mr Lyles:

There is no evidence to the contrary that I have been able to find.

Redirect examination.

By Mr. Lyon:

If they paid anything for it there ought to have been some evidence as to what they paid. I think a power dam fifteen miles long is going to flood a good many people, and cost a good deal of money for rights, privileges and franchises. There is nothing on those books to show that the street railway company gave any power to Parr Shoals to flood anybody's land up above that dam, or to show that they conferred any franchise or franchises on the Parr Shoals Company of any kind or to show that they gave them any privilege of any concrete kind whatever.

140 Cross-examination.

By Mr. Lyles:

Before you can build a power dam and back water up, somebody has got to go ahead and buy those rights. If they don't the citizens will probably use a shotgun.

Redirect examination.

By Mr. Lyon:

You buy the rights to overflow lands usually with money.

A copy of a contract dated the 6th day of April, 1905, between the Columbia Electric Street Railway, Light and Power Company and the Columbia Water Power Company received in evidence, without objection, and marked "Exhibit 20." See appendix.

T. C. WILLIAMS, white, sworn:

Direct examination.

By Mr. Abney:

The Witness: I have lived in Columbia practically since 1906. My chief business was real estate until I came to Columbia, and then I became interested in river navigation here. I have made a special study of navigation, both interior and coastwise. Before I came from Virginia, I was familiar with the Norfolk Harbor and the Chesapeake Bay, and in North Carolina I was familiar with the Cape Fear from Fayetteville to Wilmington, and I am familiar with the Congaree, Santee and Winyah Bay, and I have navigated myself around the State of Florida into the Gulf of Mexico and back. I went to Charleston, West Virginia, for the purpose of investigating the operation of barges on the Kanawha River. In 1906, 1907 and 1908 that was a very shallow river with rocky
141 shoals. It connects with the Ohio at Point Pleasant and is very similar to Broad River above Columbia some distance. The United States Government has put in a system of locks and dams. I have been through some of these locks, and barges are used in carrying coal from the coal mines along this river down the Kanawha and Ohio and then into the Mississippi and into New Orleans. These barges are pushed in front of stern wheel shallow draft boats and usually nine barges are carried—three abreast, occasionally ten. These barges carry five hundred tons of coal easily.

Before the improvements were made in the Kanawha, it certainly was in no better condition for navigation than the Broad River is. The tonnage on this river is very great; I cannot state the exact amount. This has been since the Government opened it up. I have been a member of the National Rivers and Harbors Association for a number of years and have attended most of their meetings. At these meetings, reports are made of the use being made for transportation of the navigable inland waters of the United States. I am very much interested in the possibility of inland navigation.

I first became financially interested in the navigation of the Congaree and Santee rivers in 1912. Prior to that time a boat line had been organized here in Columbia, known as the New York, Columbia and Georgetown Steamship Company. They operated two boats for a while on the Santee River. The Alcolu Lumber Company was rafting and using tow boats for handling logs from the swamp to the Santee at Ferguson, using a towboat called the "Saidie" in bringing logs to its plant. I think at this time that the Santee Lumber Company was the biggest cypress lumber company in the United States. They owned about ninety miles of timber along
the river. It is now out of business, and has been for a
142 number of years. The plant was burned and they built a hotel and a large number of houses, and they had this enormous sawmill which was burned. Later they built a box factory, covering about five acres of land and that was burned. The presi-

dent lost his eyesight and his son did not like the business and the plant was abandoned. There is a little shingle mill factory there, that is all. I never knew of this company having any trouble in navigating the Santee. The Santee Cypress Lumber Company got logs on the Congaree and carried them down to Ferguson.

The Veneer Company, which was established here in Columbia, located on the river bank a short distance above the lock and dam, acquired timber down to Sandy Run, and bought a steamer which they name "Kochaline," and that boat brought logs up to the veneer plant.

I took over the "City of Columbia" in 1913. She was a stern wheel steamer of about 130 tons capacity. She was about 140 feet—possibly over that and about a 28-foot beam. The company running that boat was the New York, Columbia and Georgetown Steamship Company.

The Clyde Line and the Baltimore and Carolina Line had entered into a traffic arrangement with the New York, Columbia and Georgetown Steamship Company for a division of freights on a 50-50 basis, that is to say: If the freights to Columbia were a dollar, the Clyde Line would bring it from New York to Georgetown and take fifty cents and this company would bring it from Georgetown to Columbia.

As to the sentiment of the people of Columbia, the opinion of everyone was that if a boat line could maintain a regular schedule it would be of benefit to this section. The freight rates to Columbia are higher than they are to Augusta. In fact, there is not a distributing point, a basic city rate point, in the State of
143 South Carolina, and the only way a rate could be brought about was by the operation of a boat line, and then the Interstate Commerce Commission, we believed, would order a reduction of the rail rates.

I was a member of the Chamber of Commerce for a number of years, but am not at present. I remember when Mr. Keedhofer was there. As to the connection between the Chamber of Commerce and the boat line, I think Mr. Hamby was secretary of the Chamber in 1910 or 1911, and he took charge of the operation of the steamship "The City of Columbia." Later the Chamber was reorganized and I think Mr. Holcome was made secretary. Soon after, we had acquired the steamer "Nan-Elizabeth," and the steamer "Ruth No. 2" about which the Chamber passed a resolution. The City Council was co-operating with the Chamber of Commerce with regard to this canal being completed and the river opened up for navigation so as to reduce rates to Columbia. During this time it was the purpose and consideration that navigation be opened up and that we should keep a steady boat line and make money out of the enterprise.

Our water rates from New York are about thirty per cent lower than the railroad rates. We could make money with a boat line at a thirty per cent less rate charge than the railroads were charging. We filed with the Interstate Commerce Commission a tariff in order to secure the issuing of through bills of lading from and to all points

in the country via this line. Our shippers were notified of this tariff which applied and it was filed as an exhibit of the Interstate Commerce Commission, with the large connecting arrangements, which are printed, and which show a considerable saving of freight. For instance, from Pittsburgh, we had a saving of 60 or 70 cents per hundred carload on bathtubs and other products, and,
144 of course, the business was considerably increased by being able to issue through bills of lading.

The company operating before our line had not filed rates and tariffs with the Interstate Commerce Commission. They had not advanced as far as we had and had not succeeded so far as we had in what we were doing. We had become one of the common carriers recognized to do business on that river by the Interstate Commerce Commission. Our business was increasing beyond our capacity to handle until the early part of 1914. The traffic committee of the Chamber of Commerce directed Mr. Keolhofer in 1917 to prepare a prospectus setting forth the advantages of adequate boat lines on this river, and the saving to commerce, and its advantages to the central parts of the State. Mr. Keolhofer, Secretary of the Chamber of Commerce, wrote a series of articles in the daily papers in regard to river navigation. I cannot say that after these articles had appeared, the merchants of Columbia were anxious to join the Chamber of Commerce, but they were interest in river navigation. Mr. Keolhofer lost his position with the Chamber of Commerce and the matter was dropped. Mr. Slatter lost his position as Secretary and nothing has been done since. At the above time, from my observation, Mr. E. W. Robertson controlled the Chamber of Commerce; I don't know what position he held. The matter was not pressed according to the lines and views which Mr. Keolhofer had expressed. Mr. Slatter was Secretary of the Chamber of Commerce. I do not know how far his efforts went toward getting a boat line, but I know that he was interested, and he did not get very far with it before he was out of the Chamber of Commerce.

Our business, the boat line, began to diminish about the last of May, 1914. We began operating in April, and the steamer, "The City of Columbia," proceeded with the work of getting these
145 tariffs filed. We then bought the "Ruth No. 2," and she was in commission possibly in September. We bought the "Nan-Elizabeth" from Dalton, Georgia, and on her first trip out, or her second trip, loaded with canned goods, she sank at Pleasant Hill, down in tide water about one hundred and fifty miles from Columbia.

At that time we had more freight than we could handle, and the shippers were anxious for it, and the master of the boat overloaded her, and the result was when she got to Pleasant Hill, he discovered a leak and sank in about 18 feet of water. The tide rises and falls there about two feet.

With that exception until the 20th of May we made regular schedules, meeting all of the coastwise boats, and there were two ocean ships that touched Georgetown per week. We made all of the schedules until the last of May, when the river suddenly fell, and

for six weeks we did not have a boat into Columbia. So that, about the last week in May all of the boats got stuck and sank. Cutting off of water at Parr Shoals was the cause of it. It was low water, so low that we could not navigate and was not such water as we had been using prior to that time. Prior to that time we had been using boats along this river successfully. After that time it was impossible to navigate the upper reaches of the Congaree on Sundays, Mondays and Tuesdays. This condition had not existed prior to the last week in May, 1911. Then a new condition appeared in the navigation of the Congaree River, practically from its mouth, forty-nine miles from Columbia. We went down the river from Granby Landing, where the water is about eighteen feet deep, but we had barely four feet over the shoals at Gill Creek and at the lower end of Congaree Creek we would have trouble, and at "Cut-over" and at Barber's Island. We never had any trouble before at these points in making the schedule. The Government had a snag boat for taking
146 logs and trees out of the river and also had a dredge, the Congaree, which sucked the sand out. That dredge did not have to operate all of the time, but usually after a flood the channel would fill up, and in a few days we would have no trouble after the dredge's operation.

After an interim of six weeks of stoppage in May, 1911, I took the matter up with the Chief Engineer of the War Department, whose duty it is to protect navigable waterways, and he began an investigation. At that time, Mr. Youngberg was the engineer in charge of South Carolina rivers and harbors. Major Howell succeeded him. Major Adams was sent to do special work.

"Q. Making your own investigations, and in conjunction with the Federal Government, what did you ascertain to be the cause of this interruption between these times you stated?

Mr. Lyles: So far as anything connected with the Federal Government is concerned, we ask for the records of the Federal Government and not the testimony of this witness as to what they are.

The Court: Yes, sir, so far as your information is derived from reports made by the Federal Government, you will not tell that, but what you know yourself, you will tell, because what that report contains can be shown by the report.

Mr. Abney: We will go through the records and produce the reports.

The Court: Yes, but the witness can only tell what he knows.

By Mr. Abney:

Q. What conclusion did you reach about it?

Mr. Lyles: We object to the witness' conclusions. It is purely a collateral matter. We are discussing matters which have not a thing in the world to do with the matters in issue.

147 The Court: One matter at issue is the availability of this stream for navigation. I think you brought out testimony on that line yourself.

Mr. Lyles: No, sir, they brought it out and the record will show it. The record will show that your Honor would not permit us to go into it. The Parr Shoals Company is not a party to this action, and we object to any testimony bringing it in as incompetent and irrelevant under the pleadings.

The Court: There is testimony from which it might be inferred that Parr Shoals was operated by the defendant in this case, and if it is shown that the defendant, in operating Parr Shoals, put obstructions in the way of navigation, that might account for the fact that there is no navigation here, if there is none.

Mr. Lyles: Your Honor admits it as showing that there is no navigation?

The Court: No, sir; it is admitted as showing the capability for navigation.

Mr. Abney: I dislike to have a different impression of what has occurred in a case; but, your Honor, I have no doubt, will recall that we at the very first very strenuously objected with regard to this particular matter of investigation, but that it was admitted on the ground that it would have some bearing. Later on they proceeded to show about some shoals which your Honor ruled out, because it could not have any effect on the water with regard to which we have this controversy. It was at that time that counsel announced that their whole case was going to be made out, 'Why should the State of South Carolina desire to have a canal opened that would not benefit a single citizen of the State of South Carolina,' and that he proposed to show that as his defense.

118 The Court: I think the testimony can come out, as I view the entire case and what has been introduced so far."

At the time the water was cut off, from the 20th of May, the water fell in the river so that it was impossible to navigate a boat, and that was the time I know because I went up to Parr Shoals dam. I saw the water being cut off, and the dam being filled and people walking across the river below without getting wet above their knees. We thought that when the dam was filled as much water would come below as came into it and, therefore, navigation would not be seriously affected, that the river would fall every Sunday morning and that it would stay low through Monday. Our trouble was if we undertook to meet the schedules, it forced us to leave Georgetown on Friday or Saturday which put us in the upper reaches of the Congaree River on Sunday or Monday, with the result that we encountered this low water. We encountered this low water in the upper reaches of the Congaree River, I should say about twenty miles. We had trouble in the draw at the Southern Railway Bridge and very little trouble then to Barber's Island. This would happen on Mondays and Tuesdays. It was about 71 miles from there to Parr Shoals. We had no trouble except from lack of water. We lacked water at the Southern Railway Bridge at Move. It takes more water to move a boat that is already stuck than it would take to move it over the same place if it were not stuck.

If, coming up the river, we encountered a low wave and the boat

got stuck, and ordinarily we had been coming across at Moye with eight inches more of water, it would take probably sixteen inches to raise that boat up, because there is some suction. I should say it would take the water about three or three and a half days to reach Moye. The impounding of the water is the cause of the trouble down there in making our connections, both in reaching here as well as leaving here. I have been a number of times on our boats that have met with this interruption in coming up to Columbia. I have gone to the relief of boats a number of times, too.

The Columbia Railway and Navigation Company was unable to land its boats nearer the city of Columbia than Granby Landing, about two miles below the city, and it was necessary to haul freights from that point by truck over public highways into the city, and we were desirous to build a railway from Granby Landing to connect up with the others. The railroads refused even to run our engine around there for us. The freight rates on sugar from Georgetown to Columbia were 8 cents per one hundred pounds from Georgetown to Granby Landing. The shipper then paid five cents per one hundred pounds to haul it from Granby Landing to Columbia. We received eight cents from Georgetown up to Granby Landing, and then the charge from Granby Landing to Columbia was five cents; in other words, we brought it 210 miles for eight cents, and they got five cents for two and a half miles. Hauling it over rough roads, the sugar sifted out and there was considerable loss. I think that practically all of the sugar that came into Columbia came in by boat line. The railroad rates on sugar were higher.

I can give you a comparative statement of freight rates: The water rate from Boston and Providence on first-class was 80 cents to Columbia, by railroad it was $1.01; on second-class the water rate was 67 cents, the rail rate 86 cents; on third-class the water rate was 55 cents, the rail rate 75 cents; on fourth-class, the water rate was 47 cents, the rail rate 63 cents; on fifth-class, the water rate was 40 cents, the rail rate 52 cents; and sixth-class, the water rate was 30 cents and the rail rate 42 cents. From Baltimore, the boat rate, sixth-class, was 23 cents and the rail rate was 34 cents. There was a saving of practically 30 cents on a cargo of epsom salts in 1914, to the Murray Drug Company, or a saving of $34.66. On two carloads of lubricating oil, there was a saving of $74.49 over the rail rate. For carload lots of general merchandise a saving of $33.49; for three carloads of sugar, a saving of $203.80; on one carload of general merchandise a saving of $33.00—a total saving on one trip by the boat "Nan Elizabeth" and a barge of $3,848.69.

We were hauling the products of certain mills and the Southern Asceptic Laboratories. Anything done on a cotton basis gets rates from Columbia to New York, by boat, which is 30 cents per one hundred pounds, and the rates were much less than railroad rates.

We were building additional barges when our trouble occurred. The reduction of freight rates, on a boat line is of benefit to the people around and north of Columbia if you could eliminate the cost of hauling from Granby Landing to Columbia. The saving would be from twenty to twenty-seven per cent, dependent upon the class

of freight. Those rates are for 1914 when we were operating. We brought cargo after cargo, thousand upon thousand of canned goods, practically all of them came from Baltimore, and we hauled practically all of that.

The Navigation Board of the United States reports the following tonnage handled on the Congaree, Santee and Wateree rivers: From 12,582 tons, value $31,400.00 in 1909 to 6,077 tons, valued at $624,955.00 in 1914. The Columbia Railway and Navigation Company was doing practically all of the business of the river in 1912, 1913 and 1914. Other cargoes were much more valuable than the logs they were floating down. Prior to the discontinuance of our boat line we were carrying all of the cotton goods we could handle. We had added a barge but could not get another barge at the
151 time and when we got another barge we could handle cotton and boxed goods on it. We were increasing our capacity in that particular. We were trying to buy boats at the time but could not buy them in the country. We were also hauling raw cotton from Georgetown to Columbia and had a contract to haul 20,000 bales of cotton from New York to Columbia. We had an agreement to haul 20,000 bales of cotton. Mr. Parker had bought 80,000 bales and we thought 20,000 was our capacity and we agreed to bring 20,000 bales to Columbia. We brought some of it, but not all. Just in the midst of it, Parr Shoals cut the water off and we could not bring it up. Had to take part of it back to Georgetown and pay rail rates into Columbia.

By the Attorney General:

I know that the dam at Bull's Sluice, which deflects the water into the canal is leaking badly. It appears to me that the dam is built of timber with rock between and then flash boards on top of it. I know the dam leaks and leaks badly, but I cannot tell you the reason for it.

Cross-examination.

By Mr. Herbert:

For a considerable time after I came to Columbia in 1906, I was conducting six or eight real estate companies and some time later became interested in river navigation.

Soon after I came to Columbia in 1907, I had a boat on the river and I used to go down the river practiclly every week sometimes to Georgetown and Charleston. I think the Government dam on the river was built earlier than 1915, but it was washed away and they built it higher. I think I testified before the Canal Commission that it was my information that it would cost $50,000.00 to excavate for the canal. Have never seen a freight boat on Broad River. Have never seen any employee of Richland county or the State at
152 the lock at the head of the canal to let through any traffic that comes down. I have seen in the river the ruins of a boat that was burned. Do not recall just when that was. The boat

line on the river had two boats at one time, "The City of Columbia" and the "Annie G." The wreck of the boat that was sold, the "Annie G" had been carried to Georgetown and put in a shipyard, and it was not worth moving, and the company, rather than bear expense of moving it, sold it. Do not know how great is the burden of the ships that come into Georgetown—the Clyde Line ships. I think Mr. Robertson has managed the Chamber of Commerce vicariously. I think he has somebody else do it for him. I cannot tell you what he did with the Chamber of Commerce, but he offered to take $25,000.00 worth of stock in the boat line with me, and I can produce his letter if you want to see it. I do not remember the exact date in May when our boats stopped in the draw at Moye, which was at the time Parr Shoals was being completed, but it was the latter part of May. The boat line had never had any trouble at Moye until Parr Shoals cut the water off, and when I undertook to go to her relief, I could not go in my own launch. It is true that the government has made the railroad build a draw at Moye on the other side of the river for the benefit of navigation.

The Attorney General furnished me with a copy of a letter from the Secretary of War to the Attorney General of the United States demanding that the Attorney General bring an action immediately to stop the illegal actions of this dam which had destroyed our boat line. The United States government came down here and made observations. I tried to overcome the misrepresentations made in Washington. We have sold the Nan Elizabeth on the river within the last two years. If a boat line were established on the river it would greatly reduce Columbia's freight rates, besides the
153 rates to the entire central and Piedmont sections of the State also. It would enable the merchants of Columbia to sell their goods cheaper to Greenwood for instance. Columbia cannot compete in that territory now with Richmond and Atlanta. The only way I see to compete is to let Columbia get a lower freight rate. You can ship from New York to Augusta cheaper than you can to Columbia although the trains pass through here.

Redirect examination

By Mr. Abney:

(Witness produced and identified letter, signed Newton G. Baker, Secretary of War, to the Attorney General, dated May 20, 1920, and also letter directed to Francis H. Weston, Esq., United States Attorney, Columbia, S. C., dated June 2, 1920.)

(Letters printed in appendix as Exhibits 21 and 22.) These letters were admitted in evidence as in rebuttal of the charge that the witness was biased, and was carrying around these letters, only to show what papers Williams was carrying around and not as evidence of the truth of the matters stated in the letters.

By Mr. Herbert:

The boat, "The City of Columbia," originally carried about 120 or 130 tons. I think the "Nan Elizabeth" carried about 120 or 130 tons. It was a fair average for a boat to pass by Gill Creek Shoal and land in Columbia with 100 tons. I think 120 tons was a good load. Ordinary box cars will carry 15 to 20 tons. I think I have seen trains with over 100 cars. I do not know what they haul. I suppose a freight train will carry 2,000 tons. I think the largest tonnage carried by the boat line was 6,000, and three train loads would carry as much as we did for the entire year. I am
154 vice president of the Navigation Company but don't know what taxes they pay.

On redirect examination

By the Attorney General:

The time is less from New York to Columbia by water than by rail. As a matter of my own knowledge, freight shipments by water from New York to Columbia take less time than by rail.

J. I. RICE, white, sworn:

Examination by Mr. Lyon:

(The testimony of this witness was received over defendant's objection that it was irrelevant.)

The Witness: I am Secretary of the South Carolina Tax Commission and have here the returns filed by defendant showing the gross earnings of its power department for the years ending December 31, respectively, as follows:

1914, $135,130.84; 1915, $5,214.60; 1916, $11,703.90; 1917, $392.38; 1918, none; 1919, $7,750.01.

Also the similar returns filed by Parr Shoals Power Company for the years:

1914, $60,779.13; 1915, $246,867.50; 1916, $253,841.15; 1917, $277,369.12; 1918, $325,661; 1919, $332,292.66.

The returns of defendant are each endorsed "in connection with the return of the Parr Shoals Power Company" and the returns of the power company are each endorsed "in connection with the return of the Columbia Railway, Gas and Electric Company."

155 Cross-examination:

By Mr. Lyles:

The Witness: The returns are for the three mill license tax on gross earnings. In addition both companies paid a property tax.

J. L. LUDLOW, recalled:

Direct examination.

By Mr. Lyon:

The Witness: The rental value of the canal with all improvements, based on the present production of power, would be $100,000 per year.

Cross-examination.

By Mr. Lyles:

The Witness: There is available at Gervais street, on a commercial basis, at the present plant 11,500 horsepower. The canal there now has available about 9,000 horsepower and I have based my calculations on 8,000 for 330 days in the year.

I did consider the 500 horsepower reserved to the Penitentiary and later bought by defendant and the 500 horsepower reserved to Sullivan Fenner and later bought in by defendant. This 1,000 horsepower is developed at the power plant and belongs to defendant by independent purchase and should be excluded from my calculations.

The city takes off its 600 horsepower elsewhere and this was not included in my calculations.

Redirect examination.

By Mr. Lyon:

The Witness: I did include the Columbia Mills Company power in my calculation. That would not be in addition.

156 Redirect examination.

By Mr. Abney:

The Witness: I have figured on the basis of an existing hydro plant so that the lessee would not have to erect one.

Redirect examination.

By Mr. Lyon:

The Witness: If defendant rents the power to Columbia Mills this should not be deducted.

J. B. LEE, recalled.

Direct examination.

By Mr. Lyon:

Q. Give us your opinion as to a fair rental value of the canal from August 20, 1917, up to the present time?

A. I haven't made such a calculation. They are developing about 11,000 horsepower at Gervais street. I would have to make a calculation before I could give it.

The witness was excused to make his calculation and was later recalled.

Q. Can you give us the fair rental value of the Columbia Canal from August, 1917, up to the present time?

A. I consider that a fair rental now would be $157,680 for one year.

Q. Would that be a fair rental for the period extending from the present time back to 1917?

A. It is very hard for me to say what the conditions were during those years but that is a fair rental now.

Cross-examination omitted.

157 ALFRED WALLACE, white, sworn:

Direct examination.

By Mr. Lyon:

The Witness: I am employed by the defendant as superintendent of their power plant. They have a hydraulic plant on the canal and also have a terminal station and a steam plant in Columbia. The Parr Shoals plant is twenty-six miles above Columbia. The power comes from these three plants to the terminal station and is distributed from there. The steam plant has been run a good deal for the last three years.

The policy has been for the company to use the canal plant to furnish all the power that was needed that Parr Shoals could not furnish. After Parr Shoals was completed, up until 1916, that did not necessitate the operation of the canal plant to its full capacity.

Under date of November 27, 1917, I made a report to the Canal Commission on the condition of the canal. (This report may be found as a part of Exhibit 8-R—see Appendix.)

I was not employed by the defendant when I made that report, but they knew I was going to make it—I had talked with them about it. This report is correct as of the time it was made.

Cross-examination.

By Mr. Herbert:

The Witness: I was told to report everything that was found not to be in first-class condition—everything wrong about it.

At that time—it was in the fall—they were not using the canal, but I don't know how long it was shut down or whether they were making some repairs on it at that time. A good many of the
158 things I reported have been fixed. The planks on the top of the dam have been replaced and the bridge has been rebuilt. It must have cost five or six hundred dollars to replace that bridge that was washed away.

I had charge of the canal at the time of the great freshet in 1916 for the defendant, and everything possible was done to save it. We gathered up everybody we could find and got the chain gang and some convicts from the Penitentiary, all we could get—probably two hundred. We put in sand bags to hold the banks. That was after Parr Shoals was in operation. The bank was badly cut just above the railroad bridge and barely held. The water was higher on the river side and in some places lacked only a few inches of getting into the canal—for a distance of one thousand feet. That bank was later rebuilt at a cost of several thousand dollars. I don't think the bank was raised afterwards as I left there in November, 1916, but I don't know.

I was working there at the time of the flood of 1908 and a section as wide as this building was washed out and the bank was badly damaged in some other places, but not so bad as in the 1916 freshet.

The 1908 flood was higher at the lower end of the canal and the 1916 flood was higher at the locks. It cost about five thousand dollars more to fix up the banks of the canal after the 1908 flood than after the 1916 flood.

When asked, whether there is use for all that both plants can supply, witness answered: At the present time Columbia couldn't do without the hydro plant at Parr Shoals. As to the Columbia plant, we operate canal plant, with the exception of Sunday, for about 10 hours. We operated about 3,000 horse power at that plant, and at times we used the steam plant to carry that. On one day, the 24th of this month, we used the canal to all it was worth and ran all of the
159 water out of it on the 24th of June.

The timber in the building at the locks is very heavy timber and it does not make any absolute difference about not having a roof there.

The Columbia Mills bridge was built in 1894. I was in Columbia when the canal was conveyed to the Trustees back in 1889 and there was no power house on the canal at this time. A power house was put there by the defendant in 1893. The canal was then owned by the Columbia Water Power Company, but the defendant had leased water power from the State.

I received a letter from the War Department of the United States,

I think in the latter part of 1914 or 1915, instructing me not to pond the water at Parr Shoals, but to give the flow of the river. That was watched very closely and we did everything possible to comply with the Government regulations—we kept men to watch it. I was then general manager and after that had general supervision of the Parr Shoals plant. We obeyed the instructions right to the letter until I left there in November, 1915.

Q. I don't know whether you can give us any information as to the flow of the water as affected by the mills, or other people.

A. On Monday and Tuesday of each week, and in low water, we had a good deal of trouble in getting water to operate properly.

Q. Was that before Parr Shoals was built?

A. Yes, sir; when there was low water we had that trouble. There are some dams above Parr Shoals, but how many I don't know personally.

I don't know how long the flat boat remained in the locks. I have never known of the county or State putting anybody up there to operate the lock. I opened this lock a few days ago and it took three men to open it.

160 In 1916, when the company was not actually using the canal, the Columbia Mills and the city of Columbia were taking water out of the canal.

The boom above the locks on the river was put there for the purpose of keeping trash and logs from coming down into the canal. It is fastened with a wire rope which can be loosened if there is any occasion for any boat to go through. Small boats come through it nearly all the time.

In 1914, when the Parr Shoals dam was finished, it was an exceptionally dry summer and the water in the river was very low.

Redirect examination.

By Mr. Lyon:

The Witness: I have never seen the Neal's Shoals dam.

Mr. Abney at this point introduced a picture of the Trustees of the canal and made a short historical statement concerning them to the jury.

The Witness: Neal's Shoals is about twenty miles above Parr Shoals—some streams come into the Broad River between the two and the river at Parr Shoals is somewhat larger. Parr Shoals does not get the water on Monday very much.

(The defendant's objection that the Journals are the only evidence by which legislative action can be proven was overruled.) The Court ruled the parol testimony was admissible to show discussion.

The Witness: I know that this matter was up before the Legislature in 1916, but I did not represent the company down there. I left the company in 1916; I know that at every session of the

Legislature for several years this matter has been under consideration; that the question was always up, as to whether they would take this property away from them.

161 Cross-examination.

By Mr. Herbert:

The Witness: I do not recall any complaint that we were not carrying out the Government regulations at Parr Shoals. I think the Government had a man at Parr Shoals and Columbia to watch the situation; we were watching it.

Redirect examination.

By Mr. Lyon:

The Witness: I do not think anyone else complained to me about the stoppage of the flow of the river. I heard of the lawsuit against the company, but I don't know of any other complaints.

W. H. KIND, white, sworn:

Direct examination.

By Mr. Lyon:

I have lived in that vicinity all of my life. Have been up to the crib dam near Bull's Sluice, and am familiar with the condition of the pond above the crib dam. I have been up there all my life. I fish on the river and if they shut the sluice up there is no way for the sand to get out, and the sand is piled up. The sand above the dam is on the west side of the river, it goes towards the east. It starts about fifty yards on the other side and goes nearly to Crane Creek. Generally on Monday you can see it more than at any other time. I do not know what causes this, but suppose it is because the water is not there to cover the sand. In some places the water is about six inches, some places a foot or two feet, to the bank half way across the river. It is very shallow. Sometimes you can go out there and walk over this which extends up the river about a
162 quarter of a mile. The sand immediately behind the crib dam is pretty bad. In pretty bad fix at Bull's Sluice. Over on the Lexington side the water flows over the dam more, because flash boards are not up. The sand bar comes down behind the dam and goes up behind the dam. When the water is not flowing over the top of the dam, it flows through the dam or leaks. I could not tell you how much water runs through these leaks. Every morning it drops about a foot or a foot and a half. I notice this every morning when I go up there fishing. I do not know what causes it to drop. A pretty good sized stream leaks through, and Bull's Sluice gets full of water.

Cross-examination.

By Mr. Herbert:

The Witness: There were seven of the cribs washed out of the in 1916 and they have all been put back, but there is a part of i in good fix. The dam has always leaked, more or less, ever si have known it. Any crib dam filled in with rock is going to The dam was put there to divert water into the canal.

I remember the old canal and there was a bridge right near w the railroad bridge is now. After the war there used to be som ton boats that came down the river. They carried about thirty of cotton and took about five men to handle them. It would t good while to make the trip down and go back. There haven't any of them coming down since the canal was finished in Nothing could get down now except a skiff, and you would ha pull it over the rocks; there are a whole lot of shoals from he Alston. All those boats stopped after the railroads were built the war. They could not get over the shoals now. There are se shoals between here and Alston and you have to pull ordinary boats over the rocks. It would be impossible to get lo
163 boats down the river unless you clean the river out, and would take millions of dollars. The channel of the rive washed away. These cotton boats were used right after the war it cost four or five dollars per bale freight on the railroads to g cotton here.

I have never known of anybody being there to operate the I fish up there every day. Neither the State nor the county has employed anybody up there.

In the days of the cotton boats the river had better water than —the channel was better. They had to pull these boats back u river—it took two men on either side and one man at the rudd

Redirect examination

By Mr. Lyon:

The Witness: The water gets pretty low sometimes below the dam, particularly on Mondays.

N. E. DERRICK, recalled.

Direct examination.

By Mr. Lyon:

The Witness (over defendant's objection of irrelevancy): On tember 1, 1911, there was a million dollars' worth of common issued by the defendant. The only consideration which I find simply a charge to "rights, privileges and franchises." The stock issued to various persons, but I do not know to whom. The co eration mentioned does not represent any tangible property. I d

know whether the old stockholders got it or the new ones, but the defendant did not get anything for it. As a result of that transaction, they increased their capital stock by $1,000,000 on their books. This was some of the common stock they were paying dividends on.

161 Cross-examination.

By Mr. Lyles:

The total amount of dividends paid by the defendant on common stock during all these years was either $70,000 or $75,000. I know that a great many banks have increased their stock by issuing dividends charged against surplus, and there was nothing to criticise in that. The banks pay as much as eight and ten per cent interest.

Redirect examination.

By Mr. Lyon:

I did not find where the Columbia Railway, Gas and Electric Company had earned $1,000,000 that they paid out in dividends, and in lieu thereof issued this stock of $1,000,000. I know that it is incumbent upon a corporation when the stock is issued to show that it got something valuable for it. The only thing I could find on the books as having been received for that stock was "rights, privileges and franchises." I did not find anything else. I did not see any note or entry upon their books indicating that this million dollars of stock was issued for dividends and their surplus reduced in like amount. I do not know of a single case where a bank issued stock to a person for rights, privileges and franchises. I know of no rights, privileges or franchises that the defendant could confer on anybody, nor do I know of any that anyone else could confer on the defendant. It is purely and simply watered stock so far as I found on the books.

Recross-examination.

By Mr. Lyles:

If you have property of equal value with the amount of the stock issued, the stock is not watered.

165 Redirect examination.

By Mr. Lyon:

I found nothing on the books to show that the defendant got anything of value for this million dollars' worth of stock that was issued.

Q. If there is anything in their books and records to show what they got they could come into this Court and show it?

A. Yes, sir.

Q. Now, if it is a fact, let them do it.

When a corporation issues a stock dividend, it is usually taken from the surplus account. When a corporation has sufficient surplus

out of which to issue stock dividends and does issue such dividend on that account, it decreases the surplus fund. They never had, s far as I have found, sufficient to issue one million dollars' worth o stock dividends to these people we have been talking about.

Mr. Lyon: Now, at this juncture, we want to ask counsel for th defense to produce any books or records they have, showing wha these rights, privileges and franchises amounted to in valuation their minute books or books of account.

Mr. Lyles: We will produce everything they ask for that is prope if reasonable time is given.

The Court: Yes, sir.

Motion for Nonsuit.

The defendant thereupon made a motion for a nonsuit upon fiv grounds in writing, which grounds are correctly quoted in the ex ceptions.

The Court ruled as follows:

I think that the evidence here is sufficient, certainly, to justify th Court in refusing the nonsuit, so I refuse the motion.

166 *Testimony for Defendant.*

G. E. SHAND, white, sworn

Direct examination.

By Mr. Herbert:

The Witness: I am a civil engineer and have been practicing th profession about thirty years. I am a son of Mr. R. W. Shand. have done a good deal of work along the line of water power develo ment and have investigated and reported on a number of them, an have built a good many dams, etc. I have done work for the de fendant at various times.

I have during the past several years made a study of the Columbi Canal and the proposed extension, and have surveyed them and ar entirely familiar with them.

The crib dam across Broad River is in pretty good and fair con dition for a crib dam. It was built a good many years ago. I 1916 some of the cribs washed out and I supervised the replacemen of them. They were generally in pretty good condition. Of cours there were some little leaks, but the timbers generally were sound Some of the bolts holding the dam to its foundation were a litt rusty, but it was remarkably well preserved considering the numbe of years they had been in.

The pond in the river above the dam is full of silt, as every othe pond on that river is. The twenty-four foot dam of the Neal Shoals plant is practically full of silt, and every one I have eve examined is practically the same way. The stream brings down

great deal of silt and it necessarily deposits above these dams. This does not affect the power situation, unless you have a storage dam—in the case of a diverting dam it has practically no effect.

167 The head gates are in very fair condition. The housing over them is in very bad repair, but that is not essential. In fact, those gates stood for a good many years without any housing at all over them.

The canal banks, I think, are in better condition than when the canal was built because they have had a good many years in which to settle. Earthwork always settles and then the growth of timber on the river side has become a great protection to the bank, making it very much more secure than when it was built. I was there during the freshet of 1916, and had it not been for the trees, we never could have saved the banks. The trees interrupt the waves in the river; so I am sure that the canal bank is in better condition now than when it was built.

After the freshet of 1916 the defendant repaired the bank and put it in good shape. I directed the reconstruction of the damaged parts.

The spillway and waste gates are of substantial construction. They are just opposite the Penitentiary. The spillway is put there to relieve the danger to the canal from too much water coming in at the head gates, and also to get a flow of water through the canal when the power plant is not in operation. If you allow the water in the canal to stay perfectly still, silt deposits very rapidly—you want to keep a flow through it and the gates are used for that purpose. The waters of Broad River carry more or less silt at all times, which deposits when the water becomes quiet. The last power plant is two or three hundred feet above the lower end of the canal and that lower end is practically filled up with silt because there is no current through it. This does not affect the power as the canal is now used because the flow of the water through the power plant keeps the channel clear to that point. There is no silt, that I know of, that interferes with the wasteway between the power house

168 and the river. The tail race is just like it was constructed originally.

I figure that the canal has 3,900 second feet at the Street Railway power plant, which would give 10,281 horsepower at that point. At the south of Gervais street, this would give 11,682 horsepower, or an 80% wheel efficiency.

I took soundings on the canal, starting at Gervais street, every four hundred feet up to the locks and found an average cross section of 1,400 square feet, a hydraulic radius of 9.02; where as the Act requires 1,300 square feet, a radius of 8.4, so that the canal as it now stands has a greater capacity for carrying water than the canal as specified in the Act—I have reference to the dimensions of 150 feet wide at the top, 110 feet wide at the bottom, and 10 feet deep. The water capacity of the canal is greater than called for by the Act. I mean that it has a greater capacity than required by the Act, except right close up to the head gates. Evidently, in 1916 the water broke through the cut of the railroad track to the east of the gates,

and washed a large amount of debris into the canal, and, I think, there is some deposit at the upper end of the canal, to 1221, which was the smallest clear section I found at that point. The resulting average of the canal is more than called for by the Act.

Byron Holley built the locks. I see no need for a dredge in the canal now. The flow of the water through the power plants and in the wasteway takes care of the canal. They did need a dredge when they first opened the canal because the power plants then didn't take enough water to keep the current flowing through the canal. Since the big power plant was built, there has been no need of a dredge.

From an engineering standpoint, as far as waterpower development goes, I consider it absolutely worthless to extend the canal below the south side of Gervais street to the mouth of Rocky Branch.

There is only a gross fall of about eight feet. The net fall
169 would be only five feet and from my investigation I find that for every foot that the river rises at Gervais street, it rises two feet at the Government locks, very near Rocky Branch. The Government has two gauges, one at Gervais Street Bridge and one at the Government locks. I took the year 1917, which was the only one I had available at the time, and estimated—compared the gauge readings of the two. I sounded in 1917, and there were one hundred and four days during 1917 during which the river stood three feet at Gervais Street Bridge and six feet at the locks, and this means that there was no additional fall at the locks or at Rocky Branch so for 28½% of that year you would get no more power at Rocky Branch than at Gervais street.

The Act specifies that the lower end of the canal is to be of smaller dimensions than the portion completed to Gervais street—makes the cross sectional area at the lower end one thousand feet; whereas the upper end has a section of thirteen hundred square feet, and in order to take the flow of water from the larger area above through the smaller area below, if completed according to the Act, you would have to increase the velocity of the water in the lower section of the canal to 3.9 lineal feet per second in order to get the same flow as through the upper channel. This is an excessive flow for an earth canal. It is liable to wash the banks. I would not attempt to put that much water through the lower canal. The lower canal should carry nearly one-third less water than the upper canal. Consequently, power developed at the lower end of the canal, if built according to the Act, would have one-third less water supply than the power developed at Gervais street.

According to the best information I can get from any source at the time that this canal was originally projected, the maximum
freshet in the river had been thirty feet. There had been
170 freshets in the river in 1797, 1820, 1840, 1852 and the big Sherman freshet in 1865, which is recorded as thirty feet at the Gervais Street Bridge. In 1866, about thirty-three feet; in 1880, about the same; in 1903, about twenty-six or twenty-seven feet, and in 1908 it was forty-three feet. So, if the banks were built to meet the freshets that have come since the canal was originally contemplated, they would have required much heavier construction.

The extension of the canal below Gervais street would subject it to much more danger from floods.

From an economic standpoint it would be absolutely useless to try to develop the canal from Gervais street on down as a power development.

Before 1893 waterpower could only be used by mechanical drive over the waterwheel shaft, and all power had to be transmitted from the wheel by some mechanical means, such as a rope or gears, or shaft. About 1893 the method of generating electricity and transmitting the current to distant points by wire came into use, and since that date practically all power is developed and transmitted in this way because you can locate your mill more conveniently. You can put your plant on the edge of the water and the mill at a safe distance. This method was not known at the time of the passage of this Act. The old plan of developing this canal contemplated the use of the flat land down below Gervais street, between the proposed canal and the river, as sites for the mills to use the waterpower. I would not think of building a mill down there now if the canal was extended.

It would not be practicable from a navigation standpoint to extend the canal down to Rocky Branch without any provision made for the locks; because we would not know where to put the locks. The Act contains no reference as to the size or location of locks.

171 From a navigation standpoint, I am not prepared to testify as to any details of navigation or construction of canals for navigation purposes, because I do not feel that I have had experience enough in that line to do so but as an engineer and having examined this canal, my idea is that the Government has sent a Board of Engineers, who have located a lock and dam as a proper method of getting over the shoals, and that it is the only Engineer-Board that I have ever known that has made a report on the subject, and they have recommended that a lock and dam be used.

Q. What effect would the speed of that water through that narrow passage, going at the velocity you said it had to go to create this power, what effect would that have upon a boat going on that canal?

A. It depends on the size of the boat—the area is rather small. A large boat coming up there against such a current would create a still greater current owing to the obstruction of the boat, and would wash the banks of the canal, and I expect it would be pretty hard to hold the boat in line, keep it guided properly.

By the Attorney General:

Q. I thought you said you didn't know anything about navigation?

A. No, sir, I didn't say that. My idea would be to use the Government lock and dam, or the pool formed by that lock and dam at some available point along the river, and if the channel that they have had excavated is not feasible for boats, dig another channel, or else have an entrance below that particular difficult part of the river.

By Mr. Herbert:

The Witness: The present hydro-electric plant of the defendant was built about 1891. That was one of the first in this country. The plant of the Duck Mills was the first one.

I estimated the cost, in May, 1918, of completing the canal from Gervais street down to Rocky Branch at $325,000. This did
172 not include any locks or rights of way. You would have to acquire, for construction of the canal, about one hundred acres of land. This did not include any overhead charges or any organization charges. It would now cost at least one-third more than this.

I would say offhand that it would cost a couple of hundred thousand dollars to construct a lock the size of the Government lock.

The general character of the soil below Gervais street is mostly river silt. You would have to get a better quality of dirt than that for the banks. The work could be done in about two years.

In 1887, when the Act was passed, it would have been impracticable to use 10,000 horsepower at any particular point. I do not think this was ever intended, because no engineer at that time would have said that 10,000 horsepower at one place was a practicable proposition.

I have already said that during periods of high water, take the one hundred and four days of 1917, that there would be no additional fall at Rocky Branch and no more power. During periods of very low water, the present plant on the canal would take up practically all of the water. During normal periods of water, there would be about 2,500 additional horsepower at Rocky Branch, provided you took off all of the water down at Rocky Branch rather than above Gervais street.

Cross-examination.

By the Attorney General

The Witness: I don't know the ordinary life of a crib dam, but that one was built about 1890, and I saw it in 1916, thirty-six years later, and was surprised to see the good condition it was in after that length of time. I am sure that I could construct one
173 that would never wash away. One that has stood thirty-six years and is in pretty good condition now would have been properly built. I would rather have a concrete dam, but this seems to have served its purpose very well. I didn't find that the wood in the dam was rotted at the time I examined it after the freshet of 1916. There were some indications of decay, but no bad condition. The whole dam is not likely to go down at once; each crib would go out by itself as it rotted.

I have stated that at times you could get 2,500 additional horsepower at Rocky Branch, but this would not pay because you could get it most of the time, but not all of the time—it would be an uncertain power. It seems to me that the additional dangers to the

canal from freshets, if extended, would offset all advantages of the additional power. You could deliver 2,500 horsepower a year, all the time, primary current—if you could deliver that as primary current, you would get $50,000 for it.

Cross-examination.

By Mr. Lyon:

The Witness: I am employed at various times by the defendant for special work. I had charge of repairing the banks of the canal when they were destroyed in 1908, and had charge of the work of trying to keep them from being washed away in the freshet of 1916. I have done other work for them now and then. Their regular engineer is Mr. Tomlinson.

I appeared at one of the committee hearings on the canal. I think I expressed the same views then as now on the question of the extension. I don't know whether the Legislature paid any attention to what I said or not. It looks to me like they might have paid some attention to it. I don't know whether they did or not. They did not act.

174 I made a written statement to the Legislature that when the new Government dam was completed, with a two foot higher elevation than the old dam, a lock from the present canal at Gervais or Senate streets, into the Government pool would give better navigation features than the extension of the canal, and I reiterate that now.

I never denied before the committee that the Congaree and Santee Rivers were navigable down below Columbia—I did not deny that it was navigable up Broad River for some distance, for I don't think they ever asked me. I said that if the Congaree River was made safe for navigation up to Senate street, it would be comparatively easy to install a lock from the canal.

I built Neal's shoals dam—it is twenty-four feet high. Parr Shoals dam is thirty-six feet. The river is larger at Parr Shoals. The Enoree and Tiger both come in between. I expect Parr Shoals impounds about twice as much water as Neal's Shoals. The object of impounding the water is to store the water at periods of low water; and on Sundays you can impound it, and then where you have a variable load, like a street railway plant, where you want a great deal of power in the afternoon and not so much at night, you use your water as you need it. You back the water of the river and keep it there to use it. That is the object of impounding it. Of course, the impounding may be only incidental to getting the fall. You may not be able to get your head without impounding.

I said it didn't make much difference about the shed over the water gates at the head of the canal. Some timber in there would have to be replaced more frequently if you don't have a shed.

If large boats should come up in the canal, you would have to rip-rap the banks in order to protect them—the same has been
175 done on the river side of the bank at points where the high water hits it.

I built a concrete bridge in Beaufort county which fell down. I drew the plans and the specifications for the Beaufort bridge, and as engineer supervised its construction. When the false work was pulled out from the concrete the bridge sank down. This resulted in a law suit. The contractor brought suit to recover the price of constructing the bridge, and I went on the stand and testified against him. A jury of Beaufort county found contrary to my contention. Under the rules of the Court I was prevented from giving the testimony that controlled me in my action in the case.

Redirect examination.

By Mr. Herbert:

Q. Is that all you care to state?
A. That is all

A. S. CRANE, white, sworn.

Direct examination.

By Mr. Herbert:

The Witness: I am a civil engineer of twenty-eight years experience, connected with the J. G. White Engineering Corporation, of New York city, as a hydraulic engineer, and also Vice President.

I have built between twenty and thirty hydro-electric plants in various parts of the country. I designed Parr Shoals and was the engineer in charge.

I have, at defendants' request, made an examination of the canal, the dam, the hydro-electric plant, and the property in general. I made this examination this week, and also last fall and on several former occasions five or six years ago. I consider that prop-
176 erty at present to be in good operating condition.

A crib dam is more liable to be washed away by a flood than a concrete dam. The present dam up there is in good condition. The canal banks are in very good condition. The growth of trees and grass and bushes on the bank of the canal tends to protect the bank and does not weaken it. A bank without such growth would be much more apt to wash away than one with it.

The head gates of the canal are in good condition. The lock itself is in good condition, except the gates—they show the effect of the weather and time. The repair of the gates involves simply the putting on of new boards. The roof over the head gates is not in good shape, but a roof is not necessary at all. It is customary in cold climates to put a cover over the head gates to protect the men when they are at work, but it is not necessary here. The machinery is very heavy and the roof is not necessary to protect it. A dredge is not necessary in the canal. There is no dredge there and the canal is in good operating condition.

A steam plant is necessary in a property of this kind to take care of emergencies when the other power is not available. The steam plant here would cost over a million dollars. The hydro-electric plant of defendant down on the canal would cost from three to four million dollars.

I have gone over the proposed extension of the canal from Gervais street down to Rocky Branch with a view of making estimates and calculations connected with it. As an engineer I have studied the matter of the development of electricity from waterpower from an economic standpoint. It would not be practicable, from an economic standpoint, to extend this canal because at low water, the gross fall would be about eight feet from Gervais street down to Rocky
177 Branch and there would be less than one thousand horse-power developed from it. At high water the back water is so great that there would be little benefit that you could get from it, practically nothing. At ordinary river stage the benefit might amount to from two to three thousand horse-power. So for quite a large expenditure you would get from two to three thousand horse-power, which you would have only part of the time.

The extended canal would be more liable to damage from floods than the present canal. It would cost about $550,000 to extend the present canal without locks and without any power plant. It would cost about $200,000 to build the power plants, making about $750,000 for the canal and power plants from which you would get only two to three thousand horsepower, only part of the year. This would not be an adequate return for the money.

A canal that is built for waterpower requires a high velocity of the water, and when a boat of any size enters it, this would wash the banks and require protection of the banks. The uses of a canal for waterpower and navigation are antagonistic. If the canal was designed for navigation, it would have been wide and shallow. It is designed as of the same depth throughout the whole length, which indicates that it was designed for power purposes. If it had been designed for navigation, it would have been of uniform width. In a waterpower canal you want the water to flow at a higher rate of speed, and in a navigation canal you want as near slack water as possible. The current in this canal, if completed, would be from two and one-half to three feet per second—about one and one-half miles an hour.

The accumulation of mud up above the dam and down at the lower end of the canal does not have any appreciable effect
178 on the use of the canal. You always find this in streams in this locality.

If you had a market for power that could be developed only part of the year, it would probably be worth $1.00 per month for horsepower, so that the 2,500 horsepower would be worth about $2,500 per month, but it is very much more difficult to find a market for this sort of horsepower.

Cross-examination.

By Mr. Abney:

The Witness: When I said there would be a conflict between the use of the canal for power and for navigation, I was speaking of the time when the gates would be open and the water wheels of the power house would be open. If there was no water being taken off for power at the lower end, the current would be very little. Opening the locks for navigation would have no disadvantageous effect upon the power plant. If you try to navigate the canal when the power plant is operating at the lower end, there would be a conflict.

If the law said that the dominant right was navigation and that all other rights must yield to this, then a purchaser under the law must take notice of this.

I examined the canal several times before the Act of 1917—along in 1911 or 1912. I made an estimate as of the cost of building a dam at the confluence of the Broad and Saluda Rivers. I don't know when this project originated. I was not then an officer of my company. I did the engineering work. Later the Parr Shoals proposition was brought to us and I had charge of the engineering design. I had nothing in view except the cost of erecting a dam at Parr Shoals and the amount of power it would produce, and whether it would pay or not. I was not an officer of my company
179 then and I do not know what consideration was paid to the effect this dam would have upon the navigable capacity of the Congaree and Saluda Rivers.

My company got paid 10% in cash on the cost of construction of the Parr Shoals dam. The cost was around three million dollars. We did not get paid anything in stocks or bonds. I do not know who paid the money or what the financial arrangements were because I had charge of the engineering and not of the finances. I am not positive, but I do not think that my company took any of the bonds or of the stock of the Parr Shoals Company or the South Carolina Development Company. The South Carolina Development Company was a Maine corporation organized to build Parr Shoals but I don't know anything about it. My company is the J. G. White Engineering Corporation and it is strictly an engineering concern. There is another company named the J. G. White & Company, which is a banking corporation, but I am not an officer in it and do not know anything about its affairs. I think the South Carolina Development Company was projected in the offices of J. G. White & Company, but I do not know anything more about it.

I know that my company built Parr Shoals and got paid for it, but I don't know who paid it as I had nothing to do with the finances.

I do not remember the exact date when I first examined the canal, but it was two or three or four years before we started Parr Shoals. I do not know about the history of the canal bank, or whether it has been neglected—all that I know is that every time I saw the canal it was in pretty good shape.

Our company is divided into departments; the Treasurer handles the financial matters and collected this money for Parr Shoals. I do not know who paid it. I am a member of the Board of
180 Directors of my company. If our bills are paid, we don't bother about them, but if they are not paid, then we do bother. If our bill had been paid in securities, the question would have come up before the Board, but we got the money.

Redirect examination.

By Mr. Lyles:

The Witness: In the engineering department of my company, of which I am head, we work about 200 men in the New York Office. I don't know how many we work outside. It takes practically all my time to run that department. We have a Treasurer who looks after the finances.

My company does engineering work all over the world and it takes all of my time to look after this. I had charge of the engineering features of the Parr Shoals dam and had nothing to do with the finances. I simply went down there and built the dam.

Depreciation represents loss of property due to wear and tear in use, decay—deterioration in value.

A proper estimate of depreciation is a certain percentage each year so that when the life of the article is gone you will have charged up its original value. If a railroad cross-tie cost one dollar and the life is ten years, then you should charge up 10% each year so that at the end of the ten years you would have one dollar charged up. Some of the property of the defendant company would depreciate very fast and some would not depreciate at all, so the charges for depreciation vary very much with the different kinds of property. It is customary to charge off 1% depreciation on a concrete dam—in addition to the wear and tear there is always some possibility of the dam being washed away, but ordinarily you would consider
181 the Parr Shoals dam as having a life of one hundred years. You should charge about 10% on machinery in the power station on the dam because that machinery wears out in about ten years.

Cross-examination.

By Mr. Lyon:

The Witness: I consider the concrete work of the Parr Shoals dam worth practically as much today as when it was built, but it is generally the custom to charge off depreciation on such dams. I don't know what is charged here.

Q. So, when up to this time they have set aside a depreciation fund, and according to your testimony up to this time they have a dam which is worth more, according to your testimony, than what it

originally was worth, and in addition to that they have this depreciation fund set up for a property which is worth more now than when it was built?

A. That is so at the present time.

The depreciation fund is generally set aside and used for some useful purpose—investing in some legitimate enterprise. It does not mean that the company has the cash.

D. R. NESMITH, white, sworn.

Direct examination.

By Mr. Herbert:

The Witness: I have been a pilot, living in Georgetown for twenty-four years until about two years ago, when the business fell off, and I am now Game Warden of Georgetown. The river traffic around Georgetown has died absolutely. The Waccamaw, Pee Dee, Black, Sampit and North Santee Rivers use Georgetown as a port. Twenty or twenty-five years ago there were regular boat lines on all of these rivers.

182 On the Waccamaw River now there is only one boat, known as the mill boat, the Comanchee, which runs only a short distance, except during the fertilizer season, when they run one of the old boats for carrying fertilizer for possibly two months. In the old days there was a regular boat line of three boats on this river to Conway—no regular boats now.

Nothing goes up the Pee Dee River or the Sampit. There is one boat line up the Black River owned by Rem Brothers and it is used by them and kept up by them. They have possibly three landings that they make outside of their own. It has no schedule at all. Rem Brothers run a big plantation and farming business.

On the Santee there is nothing except once in a while a towboat comes for some timber. In the past years the Clyde Line ran two steamers, putting one into Georgetown each week. The Baltimore & Carolina Line had two steamers, putting one into Georgetown each week, and the Atlantic Corporation ran three steamers—it didn't have a regular schedule, but ran steady from Georgetown to Baltimore. All those lines are gone now. None of those ships are running at all, but the Shipping Board runs one, passing there now, which comes in about once a month. There are no sailing vessels coming to Georgetown now. The Clyde Line boats were around two thousand tons and they came once a week.

Cross-examination.

By Mr. Lyon:

The Witness: Georgetown is about gone off of the map so far as steamboats are concerned. It has two railroads, the Seaboard Air Line and the Atlantic Coast Line; they both come in over the same route.

183 J. W. SPENCE, white, sworn:

Direct examination.

By Mr. Herbert:

The Witness: I have worked for the defendant for about eighteen years; I lived up on Broad River until I came here to work.

There are four or five shoals up on the Broad River that I am pretty familiar with, about five miles above Columbia. It is a mighty hard matter to get through the river at all in any kind of boat, even a flat bottom boat. I have fished up the river and it takes two or three men to get flat bottom boat through those shoals. I have never seen any boat attempt to come down or go up the river with a load, and they could only do it with a high river.

Cross-examination.

By Mr. Lyon:

The Witness: The flash boards are put on the dam to increase the heighth of the dam and impound the water, and they back the water up the river for some miles. You can get a boat up to the shoals, but the dam does not back the water up that far.

H. W. LIGHTSEY, white, sworn:

Direct examination

By Mr. Herbert:

The Witness: I was born and raised in Lexington county, about one and one-half miles from Broad River, about four miles from the locks. At different times I have been all the way up Broad River to Peaks. About four miles above the locks there is a shoal
184 known as Swygert's Shoals, and further up is the Harmon Shoals, and then is the Bookman's Shoals, and Ellison and Freshley Shoals. Even in ordinary times in an ordinary flat boat we used to have to get out and pull the boat over the rocks to get by these shoals. I have never seen any loaded boat that could get over them. I have known several times that flat ferry boats would get lost in the river, and they would not be able to get the boats back up the river.

C. W. BAKER, white, sworn:

Direct examination

By Mr. Herbert:

The Witness: I live in New Jersey and am a Civil Engineer by profession since 1886. I was Editor in Chief of the "Engineering News" from 1895 to 1917, when that paper was consolidated with

the "Engineering Record." I then became consulting editor of the combined journals.

I have long given especial attention and investigation to the engineering question of the economical handling of transportation; that is, what it costs to transport commodities from one place to another by various methods—railroad as compared with water transportation, etc. I have made a special study of water transportation on rivers and internal waterways.

Prior to the development of steamers these waterways were the great avenues of transportation. Even in the old days of the Indians the rivers were the practical means of transportation, even after the country became settled, because when it was a question of carrying goods over poor roads as compared with boats, the boats were very much cheaper, but when Fulton invented the steamboats in 1807, conditions changed and the boats came into very great use.

185 From the beginning of the last century until 1825 was the era of canal building. It was found to be much more economical to run boats on the still waters of the canals. From 1825 until 1850 was the era of railroad promotion, and many of the canals were then abandoned and many were very small and unable to meet traffic needs. The railroads of that time, however, were comparatively small affairs and certain of the more important waterways continued in use until a later period. The rivers continued in use quite extensively until about 1880, but by that time the railroad had come into use to such an extent that competition with the boats on the river became very serious and from that time until 1900 boat transportation decreased very rapidly. One of the main causes was the increase in the size of the railroad cars and trains. The modern railroad car carries fifty tons and on the main line a train will carry two to three thousand tons—that means cutting down labor, the cost of transportation, to a very small amount. Trains of three thousand tons require a crew of only six or seven men. No such economies have taken place on any of the rivers. One of these boats on the Congaree, carrying from one hundred to one hundred and twenty-five tons, would require a crew of thirteen men, and you have a very much slower shipment. That is one of the reasons why steamboat and ocean transportation lines have been forced out of business—because they can no longer compete with the railroads.

The very general impression which the public has in mind as to the advantages of water transportation is based on the idea that it is a cheaper method, but if it is found, as it is being found, that the railroad is a cheaper carrier, the reason for the development of waterways ceases.

186 As the old river steamers went one by one and became obsolete and rotted away, new capital has not been invested in them.

In 1915 there was quite a well developed enterprise on the Mississippi, to run boats between St. Louis and New Orleans. A three million dollar company was formed to promote that enterprise and they ran a boat of fourteen hundred ton capacity for nearly a year. They planned to put on half a dozen other boats, but after the first boat

had made nineteen round trips they found they had something like $49,000 in freight money and had spent over two million dollars, and they concluded that they had better quit.

I have seen the Government river harbor work in a good many places in the country. The Government has spent a large amount of money, but it has not been successful in restoring traffic. The traffic has not responded to the improvement of the channels.

Only one State has continued to keep alive the old canals. About 1900 the old Erie Canal, in its day one of the greatest traffic canals in the country, became practically obsolete and New York determined to rebuild that canal and other canals, and it has rebuilt them at a cost of something like $155,000,000, but this has not improved or revived the traffic on the canal.

The cost of water transportation is very much greater than transportation by rail. The insurance rates are very much higher by water.

The great cost of transportation is at the terminals. Freight handled by rail is put into the car by the consignor and delivered to the consignee, who may be thousands of miles away, while the same freight handled by a boat would have to be carried to the dock and loaded on the river boat, and then taken to the port and loaded
187 on a vessel, then taken to the point of destination and unloaded and then reloaded on the railroad. The cost of so much handling is much greater than when shipped by rail.

Formerly, when the river lines were able to handle transportation cheaply, it became the custom to lower railroad rates where water competition existed. This custom has practically ceased as the railroads do not now consider water transportation as of any importance, and railroad rates are now regulated by the public commissions.

The general rule is that the uncertainties of water transportation are so great that where quick service is essential, shippers almost invariably prefer the railroads.

Taking the circumstances under which navigation on the Congaree and Santee Rivers to Georgetown must be handled, in my judgment, it is impracticable to develop navigation there. One of the principle reasons is the character of the labor you can get to transport and handle the freight. At a small port like Georgetown you can't get any regular labor to load and unload incoming vessels and you must pick up what sort of labor you can get.

I should think a train from here to Georgetown would carry from fifteen hundred to two thousand tons. It would take a boat, carrying one hundred tons and making a trip each week, twenty weeks to compete with a railroad train.

Cross-examination.

By Mr. Lyon:

The Witness: The "Engineering News" is a paper devoted to the profession of civil engineering. It devotes quite a little space to waterways and the problems connected therewith. The paper is conducted by professional engineers and represents those opinions. It

has advocated the improvement of the rivers in this country wherever the rivers were worth while. I did not say that there were no
188 rivers worth while—that all of them had gone down the hill. I did say that traffic on the Mississippi had steadily decreased and that inland water transportation generally had decreased, and that the State of New York, even by the expenditure of $155,000,000 had not been able to restore traffic on its canals. My publication has opposed such waterways as have not been worth while. We opposed the development of the Erie Canal and the New York Barge Canal, and said it was not a feasible thing to do, but unfortunately we could not stop the expenditure in New York.

As editor of the paper, it was my duty in the interest of the public to favor enterprises which were of public benefit and oppose those which were not, and I carried out that duty not only in waterways, but any other matters.

My paper is run as a business enterprise, for the benefit of professional engineers. As an editor I would never advocate an engineering enterprise which I was sure would result in financial loss, whether waterways or anything else.

I represent all classes of engineers, and the engineers engaged in the improvement of waterways are a very small percentage of the engineering profession. But we try to represent them also. I am not one of the engineers engaged in the improvement of waterways.

I did not discourage the Panama Canal—I did not think it was going to pay dividends on the money invested, but it was a matter of national defense.

I have heard that when this country was trying to get a boat out of the Great Lakes during the Spanish-American War that they could not do it because we had no water except through British territory. I do not deny that for many years I have been expressing my opposition to the improvement of most of the river improvement
189 projects in the United States, and I did it because it costs more to haul freight on them by water rate than it does by railroad. I state that as a fact.

Q. If that be true, how is it that the city of Augusta, which maintains a small boat line on that river, can get cheaper freight rates over the railroads than the city of Columbia that doesn't have a boat line?

A. That is a matter of fixing rates by the Interstate Commerce Commission.

Q. Don't you know that it is a question of competition between water and rail rates?

A. No sir, I do not.

Q. Do you deny it?

A. I do.

Q. If that be true, why is it that the Commerce of Augusta—that the merchants of Augusta put up that money to keep that boat line running?

A. They thought probably the Interstate Commerce Commission has given them a lower rate.

Q. Because they have got a water line there?

A. It may be.

Q. Don't you know it is so?

A. I don't know it.

Q. Don't you know that as a general proposition that has been so?

A. That has been so in the past.

Q. It certainly was so up to the time of the recent war?

A. Yes, sir.

Q. And because of the disruption of affairs, attendant upon the war, you don't know what the condition is now?

A. I know what the condition is now.

Q. You know things are disturbed and disrupted for the moment, and not normal, in matters of that kind?

A. They are.

Q. You also know that the railroads cannot handle the freight offered them?

A. There is congestion on the railways. The Hackensack in New Jersey, right near New York, has been improved for navigation for ten or twelve miles. It serves mainly the shipyards right at
190 its mouth. Practically no traffic goes up it. I was not opposed to that improvement. The Passaic has been improved for a very short distance above the city of Newark — about five or six miles from Newark Bay — which is an arm of the sea. I do not oppose the improvement of the Passaic or Hackensack, all of which serve New Jersey. I never heard of the Government lock on the Congaree River until I came down here last week. I do not so that it is anything of much benefit. I should think it was a failure.

I have never seen this situation here before this visit. In my judgment the development of the canal would be a failure from an economic standpoint.

If there is any benefit to be derived from river navigation, it would be more advantageous to have your terminals on a canal because there is no variation in the water level, such as there is in a river like the Congaree. That variation in the water would cause the boats, on occasion, to break loose, and it would be hard to navigate, and you would have to provide warehouses to withstand the floods.

The average time for freight between New York and Columbia, in 1914 or 1917, depended very much on the class of freight. They expedite different classes entirely differently. As to bath tubs, hardware and things of that sort, it is impossible to tell. Of course, it varies very greatly at different times. Sometimes it might be a week or two. Other times it may take much longer. Sometimes it might take three or four days. And sometimes six months.

I do not know that river transportation, in connection with these boats into New York, took about eight days. I very recently inquired as to this. Mr. Lewis, General Freight Agent of the Clyde Line, told me when they used to leave New York and when they arrived in Georgetown.

191 They — run there any more. Up to June, 1919, I think it was. I think it took those boats about two days to come from New York to Georgetown. From the testimony here, it took

about four days for the boats to come from Georgetown to Columbia. I think that was the testimony of Mr. Williams, wasn't it? I understood him that they did not run at night.

My opinion from the testimony which I have heard as to the connections at Georgetown, that they only run boats once a week—so unless the shipment came in just before the boat left it might lie a week on the wharf in New York, and then, the boat giving it irregular service here, it might lie a week in Georgetown. I do not know whether this boat line had several boats a week from Georgetown to Columbia.

Q. Why would you oppose the improvement of a waterway that you don't know much about?

A. Simply this, that if the coast line steamers, which operate on the deep water or ocean, can't operate and make money, I don't see how it is possible for a boat to operate on a shallow river, four-foot draft, and keep its head above the water.

If a boat line on the river here could haul freight at a lower rate than the railroads, I think it might be of benefit to the community. I think the water rates were lower, but it did not last, they could not make money out of it. I got this information from Mr. Lewis, an official of the Clyde Line in New York. The Clyde Line had nothing to do with operating the boat line on the Congaree River. I do not know that they kept any account of the cost. I was speaking of the whole operation from here north. Mr. Lewis did not tell me anything about making connection in Charleston with the Southern Railroad to haul to Columbia. I do not know the freight rates from Charleston to Columbia on any particular item. I did not inquire as to that. I do not know of my own knowledge
192 that the freight rate from Charleston to Columbia was so much higher than the boat line. The boat line had to make a cheaper rate to get the business because the shippers preferred rail.

Q. Because of that very thing, and because they do make lower rates, nearly every enterprise in a city that has a possibility of water transportation is trying to improve it?

A. I don't know that.

Q. You know of a great number that are doing it, don't you?

A. There are some. I don't know how great it is.

Q. Do you know any city that is not doing that?

A. A large portion of the cities are not on any water line in any way.

Q. I am not getting out on any such proposition as that. I am asking you those that are on streams that are possible of improvement for navigation, are not they all striving to have it done?

A. I would not be certain as to that.

Q. Aren't there a great number of them doing it?

A. It is a hard matter to say what the public interest is in that matter.

Q. How is it that you know so much about these other things and cannot tell us about that—is it because it is contrary to the policy of your newspaper?

A. It is hard to gauge the consensus of public opinion. Certain people are still impressed with the idea that there is a great future for water transportation.

Q. Isn't it a fact that there are two opposing factions to this matter, and you represent the faction opposed to it, and there are a great many in favor of it?

A. There are a great many in favor of it.

Q. Isn't it a national question?

A. Yes, sir, to some extent. The Democratic and Republican parties have something to say in their platforms about the improvement of inland waterways. They hold out to the public that they want to improve the inland waterways. I would say they
193 do this because politicians are not business men. I do not say that business men are not politicians. I said that politicians are—many of them—not business men.

Q. But the politician usually has his ear to the ground and knows what the people want?

A. Some of them do.

Q. Most of them do?

A. Very likely.

Q. They do there in New Jersey?

A. We hope they do.

Q. Your Governor up there—your Governor up there thinks he knows what the people want, and tries to carry out their ideas?

A. He is not in favor of water transportation.

Q. He wants something else?

A. Yes, sir.

Q. So the people of New Jersey are not in favor of it because they are on the coast, and their rivers are only a few miles long? Don't you know, as a matter of fact, that the average man who has any falls, wants to see it succeed?

A. I think he does.

Q. So that there are not—so that, aren't you bound to conclude that the Democratic party—that its representatives are in favor of waterways?

A. The people that made the platform thought they were, undoubtedly. I have read the Democratic pamphlet.

Q. I hope it will you some good.

A. I read this: "We call attention to the failure of the Republican National Convention to recognize in any way the river development," etc., "or our inland waterways, which development is the result of the constructive policy of the Democratic administration, and we pledge ourselves to the further improvement of our navigable waterways, and we recognize the importance of connecting the Great Lakes with the freight by way of the Mississippi River and its tributaries," and so. I oppose these views. If I may make myself a little clear, there are places where the waterway is a good thing. There are tidal rivers where it is difficult to build a railroad. In such cases the steamboat may serve a useful purpose. There
194 are some tidal rivers there, but I am not referring to that especially, because we have railroads there—lots of them.

The platform that you have read from, davocates a waterway down the St. Lawrence River. That is a waterway I am very much in favor of. The waterway down the Mississippi River, as an engineering proposition, I have opposed, believing it would not be feasible. I just say that to show that I am treating this thing from a fair standpoint.

I know that New Orleans is now spending a large amount for improving their terminal and locks on the Mississippi. I have not looked closely into the matter of that city spending an enormous amount between the river and Lake Pontchartrain on the inland waterway. I am not opposed to water transportation or harbors by any means.

Q. Let me ask you, the average rates on all the railroads in the United States for the past few years has been about seven and one-half mills, but I can pick out a special crowd of roads upon which the average has been about five mills. Have you ever made any calculation to determine whether that is correct?

A. I could pick out roads where the rates are lower than that. I have made a calculation or informed myself—I do not carry the figures in my head, but the rate on all railroads has been something like seven and one-half mills per ton per mile. I have figured on the Erie Canal freight rates. I don't know what the average rate is — in fact, I may say that the average rates are very misleading. When you come to comparisons——

Q. But, nevertheless, if this document which I am reading, which seems to come from the Government Printing Office in Washington, if this document is correct, it costs about half as much to haul freight on the Erie Canal as on the railroads?

A. That is not true, as I happen to know.

I have considered the condition of water transportation
195 in other countries, including Europe. I take the facts as they are. The condition varies in different countries. I would say I consider — an economic means of transportation and that as an economic means of transportation, for instance, that the canals of England have practically been abandoned, and that the canals of Holland are still very useful. I think some of the canals in Belgium are very useful. In France, rivers like the Seine are very useful. The canals and rivers have been improved at large expense, but there is no traffic on them to amount to anything.

Q. Do you deny that this statement of three mills on the Erie Canal is correct?

A. I don't know.

Coal has often been carried from Pittsburgh to New Orleans for one-third of a mill per ton mile. I do not know of any railroad in the United States hauling coal for one-third of a mill per ton mile. I can explain how that low rate came about. It is not due to the fact that those rivers have been improved along that course.

It was probably the lowest transportation ever known in the world. And that came about on river navigation. The river up about Pittsburgh is of pretty good size. It is bigger than the Broad River. I have not seen the Santee. Pittsburgh is up in the mountains of

Pennsylvania on the confluence of the Monongahela and the Allegheny, at the head of the Ohio.

The statement: "These are microscopic figures; let me translate them into something with which the average business man is familiar. Here is something (holding up a dollar bill) with which I hope all of you are very much more familiar than I am. Suppose you have a ton of freight to ship and a dollar to spend in shipping it. How far will the dollar carry the ton by those different methods and at those different rates of transportation? By horse and
196 wagon, a little over four miles; by English steam truck, twenty miles; by rail, at the average rate for the United States railways, one hundred and thirty-three miles; at the rate on the group of selected railways two hundred miles; on the Erie Canal, three hundred and thirty-three miles; on the European canals, five hundred miles; by lake, at the average rate through the Soo Canal in 1913, 1,500 miles; while at the rate at which coal is carried, both on the Great Lakes and on the Ohio and Mississippi rivers, the ton of freight can be shipped thirty miles for a cent, three hundred miles for a dime, three thousand miles for a dollar"—is not true. I would be glad to explain. At certain times they did transport coal at very low cost. Under those particular conditions.

Q. Whenever you can get the conditions on the water, you can get a lower rate. All right. Now, in regard to these English canals, let me know if this is correct—that improved waterways tend to develop resources and industry throughout the country—I am not reading verbatim—but is that so?

A. I do not think so at the present time.

A lot of the manufacturing establishments of the United States are located in South Carolina and Massachusetts, on Fall River, in the early days. Now, Indiana is one of the great manufacturing centers, and Detroit is one of the largest.

Q. Right on the waterway?

A. But that is not responsible for it, but Detroit has a waterway. And the ships come and go, but mostly pass. They have not abandoned the Great Lakes. The Great Lakes are one of the greatest transportation waters in the world, and more traffic goes past Detroit than iron ore and coal coming from the head of the lakes. Detroit is not an iron ore city like Pittsburgh. There isn't any special harbor in Detroit.

197 The Northeastern States are just as full of manufacturing establishments as Maine is full of woods. Going out from Boston towards Cape Cod and down towards Connecticut Bay, and up towards Maine, you hardly pass a town that you don't see factories in. Part of that right along the seacost. A canal was built across Cape Cod, by a private enterprise, but they lost their money.

Q. But, still, as a matter of fact, the ships going up the coast there can save some mileage and get into Boston and New England States by going into that canal?

A. Many of them go around, rather than pay the toll. The Government has got it now, and the people who go through there

get the benefit of the canal. There is some discussion over its advantages and disadvantages. They have had a good deal of trouble in operating it. During the war two or three times a boat would ground in coming through there, and it stopped the canal two or three times, and caused a great deal of inconvenience.

Q. Now, let's get back in England. That great manufacturing center, Manchester, so says this report, was a dying city. "That great cotton manufacturing center in the early '80's was a dying city. Five thousand tenant houses were tenantless, hundreds of warehouses were vacant and factories by the score were either closing their doors or moving to the coast"—and this city was only fifty miles from Liverpool—"yet Manchester was only some fifty miles from Liverpool, one of the greatest ports of the world. A dozen years later a marvelous transformation had been wrought; the five thousand dwelling houses had been reoccupied and twenty thousand new ones had been built and were in use. All of the vacant warehouses and hundreds of new ones were teeming with business, and factories, both old and new, some of the latter being among the largest in England, were humming with industry. The disease which was threatening to destroy the life of the city was costly
198 transportation, and the remedy which wrought the wonderful change that has been outlined was the building of a ship canal." Is that true or not true?

A. I don't know regarding the very pessimistic conditions he sets up as to my own knowledge at all. I know the Manchester Canal has been a very great benefit to Manchester, but has been a failure financially.

Q. Do you want to oppose this canal down here?

A. I certainly think it would be very unwise to do it.

Q. You still stick to your notion—you are against water transportation, and it doesn't make any difference whether it is in the United States or England, unless it is in New Jersey? Now, you say you think it is a good thing to open up and improve the St. Lawrence River up north?

A. Yes, sir.

Cross-examination.

By the Attorney General:

The Witness: I took as much interest in the Democratic platform as I did in the Republican. I know that the Democrats were elected in 1908 on a platform in favor of inland waterways.

Redirect examination.

By Mr. Herbert:

The Witness: The ultimate cost of all transportation comes out of the people.

W. M. Otts, white, sworn:

Direct examination.

By Mr. Herbert:

The Witness: I have lived in Columbia over eighteen years and am president of the Columbia Lumber and Manufacturing Company. I have been a continuous member of the Chamber of
199 Commerce and have been an officer of it off and on ever since I have been in Columbia. I have been a director off and on and vice president of the board and at one time president of the Chamber of Commerce.

Q. Has Mr. E. W. Robertson, since your entire time in connection with that body (Chamber of Commerce), ever dominated that body?

A. Not to my knowledge, and I ought to have known it if such a thing happened. I have been in very regular attendance, especially on meetings of the Board of Directors, etc. I have never seen any indication of Mr. Robertson dominating or attempting to dominate that body.

Early in 1903 a proposition was made to the people of Columbia to operate a boat on the Congaree River; that is, to subsidize the boat and stand the loss on its operation. A number of us subscribed the money. We went up and down the streets and got the merchants and business men to subscribe. We had to stand a part of the loss. After a few months' operation, the boat burned near Georgetown. We made an effort to get the owner to rebuild it, but never succeeded.

Possibly a year or two later we started a movement to get a boat line between Columbia and Georgetown. We held quite a number of meetings and finally got about twelve or thirteen thousand dollars in subscriptions. The New York, Columbia and Georgetown Steamboat Company was organized. I was vice president. We undertook to build a boat and it was launched about 1905, and we operated it for eight or ten years. During that time I had a good deal of experience with boats on the Congaree and Santee rivers, and the building and operation of boats. That boat line was not a success. We just didn't seem to be able to get up the stream with any freight. We calculated that it would take between forty and forty-four hours to get up the river from Georgetown, but I have known the
200 boats to stick on the sand bars for ten or twelve days, and in the meantime we would have freight at Georgetown and would have to bring it by rail. Taking it as a whole, we just could not bring the freight up the river.

As to the worst places in the river, it was all so bad that it is like a miserable dream to me. It looked to me every time we tried to make a trip it was all bad, especially in the summer season. This boat line stopped operation before the Parr Shoals dam was ever heard of. When the boat line stopped operation, it was in a bad financial condition and had been for sometime. We had, several of us, endorsed a note to buy the boat and the bank wanted the money.

The boat had to be sold to satisfy this claim and we sold it to Mr. Guignard.

The individuals had to pay this note. Everything that my company and I put in the boat line, we lost.

I was chairman of the Traffic Committee of the Chamber of Commerce and our work was largely to foster the navigation of the river between Columbia and Georgetown. I went on the first trip on the boat that we built, and I have been down the river on everything from a launch to a steamboat, and from my knowledge and experience, I would very frankly say that I would not put a dollar in a boat line and would not advise anybody else to do it. My conclusion is drawn from a good many years of actual experience.

Part of my work as an officer and a member of the Chamber of Commerce was to get improvements on the river, and we fought for this in every way we could and used every influence we could.

Appropriations have been made for improvements from year to year, but I have not seen any good results. I cannot see them, and I do not believe as to the operation of a boat line for revenue that it can be done.

201 From my experience, I would be very skeptical as to anything improving the situation there, even an enormous expenditure of money, and even if that was made it would be a question of doubt in my mind as to whether the Congaree would be practical for navigation.

Cross-examination.

By Mr. Lyon:

The Witness: Mr. E. W. Robertson is president of the defendant. I have never been connected in business with him, but I do business with the bank of which he is president, and he buys material from me when he wants it. I have no official connection with the bank and have never had.

Mr. Robertson and I and some others organized the Cantonment Investment Company that brought Camp Jackson here. I have never been connected with him in any other business enterprise, except a building and loan association, and perhaps in the subscription to the boat line. He, or his company, were stockholders in the boat line. I have had absolutely nothing to do with defendant.

The Cantonment Realty Company was an organization of the public-spirited citizens of Columbia for the purpose of securing an army camp, and they made subscriptions for this purpose.

Our object in running the boat line was to get a freight rate benefit that we otherwise didn't have. We thought we could get lower freight rates because with our connecting boats at Georgetown we could make rates lower than the railroads.

The Clyde Line made us a very generous arrangement on a fifty-fifty basis. I do not know that the Augusta-Savannah Boat

202 Line gives Augusta better freight rates than Columbia. Augusta has, in a limited way, advantages over Columbia.

Until Camp Jackson was located in Columbia we had so few wholesale dealers that we were not in it with Augusta from a wholesaler's standpoint. I understand the merchants of Augusta subsidized the boat line to compete with the railroad rates, but I also understand that a boat has not run on the river for a considerable time.

W. H. GIBBES, white, sworn.

Direct examination.

By Mr. Herbert:

The Witness: I was born and raised in Columbia and am now Chief Game Warden for the State of South Carolina. I was Mayor of Columbia from 1910 until 1914. Council was composed of R. W. Shand, R. C. Keenan, W. S. Stieglitz and R. J. Blalock.

In 1912 the question came up as to an Act of the Legislature authorizing the construction of a dam across the Broad and Saluda rivers, about opposite Elmwood avenue.

The proposed Act was submitted to the City Council and it was referred to Mr. Shand, who was in charge of the legal department, to see that the interest of the city was properly protected, and we recommended the passage of the Act.

The Power Company made certain propositions as to benefits the city waterworks was going to get that seemed advantageous to us, and about that time the United States Government was in the midst of an enterprise intended to bring navigation to the foot of Senate street, and for all those reasons Council felt that the interest of the city was safeguarded and endorsed the proposed Act. The proposed Act did not include the completion of the canal from Gervais street down to Rocky Branch.

203 I wrote an open letter to the Legislature showing the position of City Council.

(Letter introduced in evidence. See Exhibit 27.)

Cross-examination.

By Mr. Abney:

The Witness: I do not remember all the details of the transaction, but I remember that the matter was up and was considered by Council, and that Council directed Mr. Shand to look into the legal phases of it. The proposition of the Power Company was gone over and changed somewhat and was then agreed to. I went carefully over the letter and eliminated certain things in it and signed it. The Act as then made satisfactory to City Council was later amended by the Legislature by inserting a provision requiring the company to complete the canal, and inserting some provision as to damages and the dam was not built.

The letter (Exhibit 27) stated my conviction.

C. M. TEW, white, sworn.

Direct examination.

By Mr. Lyles:

The Witness: I have been auditor of defendant for twenty years. The Canal Commission has had some of our books for one and a half or two years, others they got more recently. Mr. Derrick examined our books about two months ago. I was required to turn the books over by the subpœna of the Canal Commission.

Last summer our books were audited twice by the South Carolina Public Service Commission.

During the whole life of the company—more than twenty years—we have paid out $595,478 in dividends on preferred stock 6% per year. We paid dividends on common stock in only three
204 years—a total amount of $75,000 or 3¾%—making a total amount paid out in all dividends during the life of the company of $670,478.

All the money the company has made, outside of those dividends and the interest on the bonds, has gone back into the property, into improvements, extensions and enlargements of the property. Not a dollar of our surplus account represents money in bank—it is all money that has gone back into the property. The company is about ten times as large as it was twenty years ago, and the public is still calling for extensions. We are now trying to raise money to enlarge the gas plant and extend the mains to meet the demands of the public. The money put back into the property very largely exceeds the surplus account of the company.

The Parr Shoals plant is carried on my books as part of defendant company. Parr Shoals started operating in 1914. We have a terminal station in Columbia. Into that goes the power from Parr Shoals—the canal plant and the steam plant—like three pipes feeding water into a reservoir. The reservoir has to be kept to a certain level to meet the demands upon it and if we get more from one source we do not need as much from the others. Sometimes we operate even the steam plant to meet the demand, when the supply from the others falls off—because of low water or accident.

The canal has produced kilowatt hours of power as follows: In 1914, 14,069,069; in 1915, 11,544,860; in 1916, 9,529,842; in 1917, 5,057,210; in 1918, 5,345,170; in 1919, 5,766,305. At two mills per kilowatt the profit or rental value of the canal would be: for 1917 and 1918 about $10,000 and for 1919 about $11,000.

205 Cross-examination.

By Mr. Lyon:

The Witness: I have no record of the power produced by the canal prior to 1914. From Parr Shoals we got the following kilowatt: In 1914, 13,175,685; in 1915, 27,016,243; in 1916, 31,130,500; in 1917, 41,821,000; in 1918, 43,817,030; in 1919, 44,622,240.

There was a decrease in the kilowatt hours furnished each year from 1914 to 1919, and a corresponding increase furnished by Parr Shoals. In 1914, the canal furnished over 50 per cent of the power, Parr Shoals less than 50 per cent. In 1919 the canal was furnishing 9 per cent and Parr Shoals over 90 per cent.

(Over defendant's objection) I testified before the Canal Commission that I was simply the bookkeeper and carry out the directions of the treasurer.

In 1918 we set up $390,000 as depreciation. This was merely a liability and does not represent money put aside. It is an account showing the wear and tear on property, and representing the diminished value of our property. It is a liability to show you can't use all your surplus for depreciation or anything else, that you have got to apply some of it to replacement of your property. As to Mr. Shand's testifying that it would cost $325,000, or something like that, to dig the canal, I would say there would be something to prevent, because that $396,000 represents the diminished value of our property, due to wear and tear and depreciation, and if it is used to dig the canal, it would be diverted from that purpose. I think it is to keep the property up to its original efficiency. It has not been used yet. It indicates the present condition, that the property has gone down in value that much. This is set up as a liability and does not mean cash in the bank.

206 Q. Isn't the real exact reason why you set up that $396,000 of depreciation in 1918—wasn't the real reason to cut down the amount of the United States taxes you would have to pay?

A. That was one of the objects, undoubtedly. The notes given by the Parr Shoals Power Company to the defendant and the bonds of the Parr Shoals Power Company paid by the defendant, amounting in all to $333,180, have been charged off of the surplus account of the defendant. Parr Shoals received the benefit of this and the defendant received no benefit at all so far as my books show. The defendant owns $2,000,000 of common stock of the Parr Shoals Company—they did not pay anything for this stock that I know of, there is no entry on the defendant's books to show that they paid anything for it. I think if anything had been paid, I would likely have found it. In 1911, there were $1,000,000 worth of stock issued in the defendant company, which were charged off to rights, privileges and franchises. There was no money or property or anything else which defendant got by that transaction that I know of. It was my understanding that this was stock bonus given with the sale of the bonds. I don't think the $2,000,000 of Parr Shoals stock is worth a cent in money, or was ever meant to be. It can never pay any dividends. My idea is that the whole value of that stock is that the Columbia company gets the ownership of the Parr Shoals Company through it.

The $200,000 of canal bonds are still outstanding on our books. They are past due. We are still paying interest on them. I do not know what arrangement has been made about them.

The company returned every cent of gross earnings from power

to the Tax Commission for the three mill license tax—some
207 on its own return and some on the Parr Shoals return—the returns were made in connection with each other.

The Court: I don't remember whether he has testified what the income was from the canal since the 20th of August, 1917, the day you allege in the complaint.

Mr. Lyon: He has already testified to that.

The Court (to Witness): Can you give us the income from this canal since August, 1917—during 1918 and 1919?

The Witness: I cannot.

Mr. Lyles: He gave the kilowatt from the canal and then took Mr. Ludlow's figure of two mills.

Mr. Lyon: We do not admit that the proceeds of the depleted use of the canal since Parr Shoals has been in use represents the rental value.

The Court: You are not suing for rental value, but simply asking for what has been or may have been received.

Mr. Lyon argues the point.

The Court: I will cover the measure of damages in my charge.

C. M. Tew, recalled:

The defendant has received from the Columbia Mills Company from August, 1917, to June, 1920, inclusive, $53,172 on its water power contract.

The witness then furnished a statement of power generated at the canal during the five months of 1920. See Exhibit 31.

The defendant does not sell particularly power generated by the canal, it sells power from all its sources. The price varies from eight and a half mills upward, depending upon consumption and other circumstances. For electric lights we charge from nine cents per kilowatt, the highest rate downward, with a discount of ten per cent for payment of bills before the tenth of the month.

208 Mr. Lyles objects because this is too remote to show the rental value of the canal. Overruled.

Redirect examination

By Mr. Lyles:

The arrangements between the defendant and the Parr Shoals Power Company are covered by the Operating Agreement which was recorded in Lexington and Fairfield counties. The defendant runs Parr Shoals, pays its debts and takes its earnings—and the money that is paid out on account of Parr Shoals has been paid according to that agreement.

Mr. Lyles: In view of the testimony of Mr. Tew that the information testified to by Mr. Derrick and Mr. Gardner, accountants, was obtained in the legislative investigation by the Canal Commission,

we now make a formal motion to strike that evidence from the record.

The Court: The motion is overruled.

G. R. JONES, white, sworn.

Direct examination.

By Mr. Herbert:

The Witness: I am now employed at Neal Shoals. I was employed at Parr Shoals from January 19, 1914, to March 1, 1918. From about 1915 we operated the Parr Shoals dam in accordance with the Government orders and adhered strictly to those orders. The Government had Mr. Whitescarver up there.

The Attorney General: We object, as we have nothing against Parr Shoals and are not trying that case.

The Court: You brought out testimony showing that Parr Shoals was obstructing the river in violation of Government regulations and this is in reply.

209 The Witness: From that time on we had no complaint either from the Government or Mr. T. C. Williams that we were not carrying out the Government orders.

There are five principal dams on the Broad River—Gaston Shoals, 99 Islands, Lockhart, Neal Shoals, and Parr Shoals—all of them run cotton mills and the majority of the mills are closed down from noon Saturday until Monday morning, and if the river is low, the water goes up and down before it gets to Neal Shoals, and after it gets there and before it gets to Parr Shoals. It varies all the way up. I have observed, both at Neal Shoals and Parr Shoals, that the water is lower at both dams on Sunday and part of Monday than at other times. At 99 Islands they have a very high dam—when they shut down Saturday the water is probably ten feet below the top of the dam and has to fill up the dam before it can flow down the river. On two different occasions in 1918 they shut down the 99 Islands and the river was very low.

Mr. Abney: We object to this testimony as irrelevant.

Mr. Herbert: This is directly in reply to their own testimony, particularly that of Mr. Williams, who testified that the defendant had interfered with navigation by stopping the water in Parr Shoals, and we want to show that Parr Shoals had nothing to do with it and that the river would go up and down just the same if Parr Shoals was not there, on account of the dams above.

The Court excludes any further testimony as to the effect that Parr Shoals may have or may have had in the past on the Congaree River.

Mr. Herbert: We expect to produce considerable testimony from this and another witness to establish our contention on the record as to that.

210 The Court: I think the effect of the operation of Parr Shoals on the river below is altogether irrelevant, and all that testimony can be disregarded.

Mr. Lyles: We now offer in evidence the following letters from the defendant to the Canal Commission:

Letter dated September 16, 1919—see Exhibit 8-N.
Letter dated November 6, 1919—see Exhibit 8-P.
Letter dated November 27, 1919—see Exhibit 8-Q.

Mr. Lyles: We offer these letters under the allegations of our answer to show that under all the circumstances of the case the canal should not be forfeited. We will now read the first letter of September 16, 1919 (Exhibit 8-N), and if counsel on the other side later want to put in the reply of the Commission thereto (letter of October 11, 1919, Exhibit 8-O), then we will read our other letters.

Mr. Abney: He should introduce the whole correspondence.

Mr. Lyles: We have no objection to giving the jury a coherent story now, and if Mr. Lyon will read the letter from the Commission we will be glad to read the others.

Mr. Lyon then read the letter of October 11, 1919. See Exhibit 8-O.

Mr. Lyles then read the letter of November 6, 1919, Exhibit 8-P, and the letter of November 27, 1919, Exhibit 8-Q.

Mr. Lyles: We have in Court the Journals of both House and Senate of the General Assembly of South Carolina covering the years from 1890 down to date, as well as the Acts, and we introduce these and call attention to certain portions as evidence to negative any demand by the State of South Carolina that we complete the canal according to the terms of the Acts of 1887 and 1890.

Mr. Abney: We have no objection to anything appearing upon the records of the House and Senate. We will be glad to present
211 such as we know of or can find and also counsel have the same liberty to do so.

Mr. Lyles: We first point out that for the years 1890-1913, inclusive, there are no Joint Resolutions, even introduced, and the following are the only Acts:

In 1892, 21 Stat., 94: An Act to ratify the contract between the Penitentiary and defendant as to development of the water power reserved by the State from the canal for use of the Penitentiary. (Contract also introduced as Exhibit 32. See Appendix.)

In 1912, 27 Stat., 782: An Act authorizing defendant to construct and maintain a dam at the confluence of Broad and Saluda rivers.

In 1914, 28 Stat., 881: An Act requiring the city of Columbia to continue to maintain the bridge across the canal.

In 1914, the Wyche Joint Resolution was introduced but was not passed. See Exhibit 50*a*, Appendix. (Mr. Lyles: This Resolution would have been a demand, if enacted, and we prove that the Legislature had before it the question of making a demand and did not do it.)

Mr. Lyles: We now point out that, excepting the Acts and Joint Resolutions noted, there were none from 1890 to 1914, inclusive, and none during 1915, 1916.

In 1917, the Act under which this suit is brought and the Act authorizing the Canal Commission to make a legislative investigation. See 30 Stat., 348, and 1118.

In 1917, the Mauldin Joint Resolution was introduced in the House but was not passed (see Exhibit 50-B—Appendix), and the Kitchen Joint Resolution was introduced in the Senate but was not passed (see Exhibit 50-C—Appendix).

212 *Testimony in Reply by the State.*

J. L. LUDLOW, recalled.

Direct examination.

By Mr. Lyon:

The Witness: Mr. Shand, in his testimony, fell into error as to the amount of slope and amount of fall necessary to have the water flow from Gervais street to Rocky Branch, if the canal was extended. He overlooked the fact that where the cross sections of the canal grow smaller, the canal is deeper than in the upper sections. Therefore, the loss of head, due to the lack of slope, would not necessarily obtain. My figures are predicated on the proposition of the canal as a whole in its completed form.

Cross-examination.

By Mr. Herbert:

The Witness: The Act says the canal is to be the same depth down below Gervais street as it is above, but the land there lies so low so that if they made the canal there only ten feet deep, they would have to build it above the level of the surrounding ground. If they only complied with the particular dimensions given in the Act and made it there only ten feet deep, they would have to fill in rather than dig. If they built up the banks at all, it would be more than ten feet deep at the lower end. I consider that the dimensions given in the Act are the minimum dimensions, and they could dig it deeper.

Mr. Abney then offers in evidence certain Concurrent Resolutions to which Mr. Lyles objects: They are irrelevant because under our Constitution a Concurrent Resolution would not be sufficient action by the State to amount to a demand—the only way the Legis-
213 lature can act to affect anybody's rights is by a Joint Resolution or Act,—our Constitution requires three readings and the Governor's signature, and a Concurrent Resolution does not receive these, and the Resolutions are further irrelevant because their language does not amount to any demand for completion. The objec-

tion was overruled as to each Concurrent Resolution and they were received in evidence, as follows:

In 1910, the Dixon Resolution—see Exhibit 50-D, Appendix.

In 1910, the Graydon Resolution—see Exhibit 50-E, Appendix.

In 1911, the Johnson Resolution—see Exhibit 50-F, Appendix. As to this Mr. Lyles pointed out that the Journals showed this Resolution to be in error in quoting the 1910 Resolution—that the Johnson Resolution evidently purported to quote the Dixon Resolution because the latter became effective February 16, 1910—but the first resolving clause, "That it is to the interest of the State, etc.," had been struck out by the House on the recommendation of the committee—(see Exhibit 50-D). In any event the Graydon Resolution of 1910 never contained such a clause—(see Exhibit 50-C).

In 1913, the Welch and Weston Bills—see Exhibit 50-G, Appendix.

In 1915, the Etheridge Concurrent Resolution—see Exhibit 50-H, Appendix.

In 1916, the La Grone Concurrent Resolution—see Exhibit 50-I, Appendix.

The State rests.

214 APPENDIX.

Summary of Exhibits.

EXHIBIT 1.

Notice to produce omitted.

EXHIBIT 2.

Notice to produce omitted.

EXHIBIT 3.

Notice to produce omitted.

EXHIBIT 4.

Deed from Board of Directors of South Carolina Penitentiary to Board of Trustees of Columbia Canal, Dated February 1, 1888, and Recorded March 1, 1888.

This deed quoted, by way of recital, from the first, twentieth and twenty-first sections of the Act of December 24, 1887 (the Act creating the Canal Commission and found in 19 Stat., 1090), and then quoted by way of recital from the first, second, third and fifth sections of the Act of December 24, 1887 (authorizing the city of Columbia to guarantee the payment of interest on said bonds, and found in 19 Stat., 1097), and then recited the fact that the election was duly held and declared and the Board of Trustees duly constituted, and then proceeded:

"Now, know all men by these presents, That we, the Board of Directors of the South Carolina Penitentiary, by virtue of the power conferred upon us and in accordance with the provisions of the Act of the General Assembly herein first above mentioned, and in consideration of the premises have granted, transferred, assigned
215 and released and by these presence do grant, transfer, assign and release unto the said 'Board of Trustees of the Columbia Canal' all the right, title and interest of the State of South Carolna in and to the Columbia Canal, and the lands now held therewith acquired under the Acts of the General Assembly of this State, with reference thereto or otherwise, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, with all and singular the rights, members and appurtenances thereto belonging for the use and benefit of the city of Columbia, for the purposes set forth and expressed in said Act, subject, nevertheless, to the performance of the conditions and limitations therein set forth and prescribed on the part of the said Board of Trustees and their assigns: Provided, That should the said canal not be completed to Gervais street within seven years from the passage of said Act all the rights, powers and privileges guaranteed by said Act shall cease, and the said property shall revert to the State.

"To have and to hold all and singular the above described premises and their appurtenances unto the said Board of Trustees of the Columbia Canal, their successors and assigns forever, subject to the provisions and condition- aforesaid."

Exhibit 5.

Deed from Board of Trustees of Columbia Canal to Columbia Water Power Company, dated January 11, 1892, and recorded January 23, 1892.

This deed quoted by way of recital from the first section of the Act of December 24, 1887 (creating the Board of Trustees, 19 Stat., 1090), and recited the deed from the Board of Directors (Exhibit 4).

It then referred to Sections Nine and Ten of the Act of 1887, authorizing the Trustees to issue $200,000 of bonds secured by mortgage on the canal and to the Act of 1887 authorizing the city
216 of Columbia to guarantee the interest on such bonds, and recited that $200,000 of first mortgage bonds had been issued, secured by mortgage of the canal, and the interest guaranteed by the city.

It then quoted Section 2 of the amendatory Act of December 24, 1890 (20 Stat., 967), amending Sec. 23 of the Act of 1887, and then proceeded:

"Whereas, George Wallace, on July 14, 1891, made the following proposition to the Board of Trustees of the Columbia Canal and the Mayor and Aldermen of the city of Columbia for the purchase of the Columbia Canal: 'I will pay for the canal completed to Gervais street, transferred to me under the authority of the Act of the General Assembly of December 24, 1890, and subject to the conditions,

duties, and liabilities thereby imposed, and by other Acts of the General Assembly relating thereto, excepting therefrom, for the use of the city of Columbia, a strip of land on the east and west side of the canal from the north side of Laurel to the south side of Blanding streets, the two hundred thousand dollars of mortgage bonds on the canal when the same shall mature, and will guarantee to pay the interest on the said bonds as the same may fall due in such manner as shall be satisfactory to the City Council and it may approve of when the canal, completed to Gervais street, shall be transferred and possession given, said payment and guarantee of interest to commence from the transfer and delivery of the possession of the canal, and sixty thousand dollars to be payable as follows:

"Fifteen thousand dollars cash upon the approval of the title to the canal by our attorney, and signing of the contract for sale, which shall be within seven days from the signification of the City Council that they will accept this proposition; and fifteen thousand dollars within twenty days from the date of the signing of the con-
217 tract; and thirty thousand dollars upon the completion of the canal to Gervais street, said completion to be approved by Mr. Byron Holly, the engineer in charge of the work, and the delivery and transfer of the possession of the canal which shall be not later than November 1, 1891. If, however, the canal is not completed to Gervais street and possession given by the first day of November, 1891, the Board of Trustees are to allow the undersigned interest at the rate of six per cent per annum on the sums of money previously paid until the canal is so completed and possession given. That the undersigned will allow, free of charge, whenever the city should require it for its use, an additional 100 H. P. of water power to 500 given by the Act to the city of Columbia. The city of Columbia shall have the right to bridge the canal at its waterworks to reach the same, under the regulations prescribed by Act of December 21, 1887; and,

"Whereas, The said proposition was accepted by the Board of Trustees of the Columbia Canal, and upon being submitted to the City Council of Columbia, the same was unanimously approved and consented to at a meeting held on July 15, 1891, eleven members of the City Council being present and approving and consenting thereto; and,

"Whereas, The said agreement for the purchase of the Columbia Canal was on the 4th day of August, 1891, duly assigned by George Wallace to Aretas Blood, and on the 24th day of September was duly assigned by said Aretas Blood to the Columbia Water Power Company, a corporation duly incorporated by and under the laws of the State of South Carolina; and,

"Whereas, under said agreement the Board of Trustees of the Columbia Canal and the city of Columbia have received the sum of thirty thousand dollars agreed to be paid by the purchasers of said canal within twenty days from the acceptance of the proposition to purchase; and,

218 "Whereas, The said George Wallace in the contract of purchase hereinabove set forth, did agree to guarantee to pay

the interest on the said bonds as the same may fall due in such manner as shall be satisfactory to the City Council and it may approve of; and, whereas, in pursuance of said agreement the said Columbia Water Power Company, the assignee of said contract, has entered into a written agreement under seal with the City Council of the city of Columbia to pay the interest upon the said Canal Bonds as the same shall fall due, wherein the said Columbia Water Power Company has agreed to deposit certain bonds in the cities of New York and Columbia for the purpose of guaranteeing the payment of the interest on said bonds, and wherein the said Columbia Water Power Company has, among other things, agreed that on default of payment of interest as the same shall fall due, for six months, the bonds deposited in the cities of New York and Columbia shall become the property of the city of Columbia and the Trustees holding the same shall be authorized to deliver the same to the city of Columbia, and the said Columbia Water Power Company shall lose all interest under the aforesaid contract of George Wallace with the Board of Trustees of the Columbia Canal and the city of Columbia, and also all interest under such deed as shall be made to said Columbia Water Power Company, and the said property shall immediately vest in the city of Columbia, and the said Columbia Water Power Company shall thereupon execute title deed to the city of Columbia therefor; and wherein said Columbia Water Power Company has, among other things, also agreed that in case at any time the market value of the said bonds should depreciate to or below ninety-five cents on the dollar, or any of said bonds shall be hypothecated or sold as in said agreement provided, the said Columbia Water Power Company shall within thirty days
219 after notice make up such deficiency, whether the same be in amount of value, by deposit of sufficient bonds, selling not below par, and if such deficiency shall not be made up within six months from the date of such notice then the same consequence to ensue as in case of default in payment of interest for six months; and,

"Whereas, The said Columbia Water Power Company has made such deposit, which said agreement and deposit have been accepted by the said City Council of the city of Columbia as a satisfactory guarantee of the payment of said interest in pursuance of said contract and the same has been duly approved by said City Council; and,

"Whereas, The said canal has not been fully developed and completed throughout its entire length from its source at Bull's Sluice to the point where it empties into the Congaree River, and has not been turned over to the city of Columbia, but the same has been completed to Gervais street, as appears by the certificate of Byron Holly, Chief Engineer, of date December 11, 1891; and,

"Whereas, Nine members of the City Council of the city of Columbia approve and consent to the sale and transfer of the Columbia Canal and the lands held therewith and all the rights, easements, privileges, appurtenances and franchises conferred on the Board

of Trustees of the Columbia Canal and otherwise acquired, on the terms herein contained; and,

"Whereas, Thirty days' notice of the said sale, alienation and transfer, and the terms thereof, has been given to the City Council of the city of Columbia;

"Now therefore, know all men by these presents, That the said Board of Trustees of the Columbia Canal, a corporation duly incorporated as aforesaid under the laws of the State of South Carolina, in pursuance of the power vested in them by the General Assembly of the State of South Carolina, by Section 23 of the Act last
220 above mentioned, as amended on December 24, 1890, and by and with the approval and consent of nine members of the City Council of the city of Columbia, in consideration of the sum of thirty thousand dollars to them heretofore paid within twenty days after the making of the contract of sale as aforesaid, and in the further consideration of the sum of thirty thousand dollars to them this day paid by the said Columbia Water Power Company, the receipt whereof is hereby acknowledged, and in consideration also of the payment by the said Columbia Water Power Company of the two hundred thousand dollars of the said mortgage bonds on the canal when the same shall mature, and in consideration of the guarantee of payment of interest as aforesaid, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Columbia Water Power Company, its successors and assigns forever, all that property, situate, lying and being in the State of South Carolina, in and near the city of Columbia, known as the Columbia Canal, and the lands held therewith acquired under the Acts of the General Assembly of said State with reference thereto, or otherwise, from its source at Bull's Sluice through its whole length, to the point where it empties into the Congaree River, at or near the mouth of Rocky Branch, including all lands, easements, rights of way, rights of overflow and appurtenances acquired by the said Board of Trustees of the Columbia Canal in the development and improvement of the said canal or otherwise, whether the same be in Richland county or Lexington county, together with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining, and together with all the rights and franchises conferred by the General Assembly of the State of South Carolina on the said Board of Trustees of
221 the Columbia Canal, excepting therefrom, for the use of the city of Columbia, a strip of land on the east and west side of the said canal from the north side of Laurel street to the south side of Blanding street.

"To have and to hold all and singular the premises before mentioned unto the said Columbia Water Power Company, their successors and assigns forever, subject, nevertheless, to the conditions limitations, provisos and exceptions set forth and prescribed in the Acts of the General Assembly of the State of South Carolina hereinabove mentioned, and subject to the provisions of the proposition of George Wallace of July 11, 1891, hereinbefore contained; and sub-

ject also, to the agreement of the Columbia Water Power Company, of date the — day of ——, 1891, wherein the said Columbia Water Power Company did agree that on default of payment of interest on said canal bonds, as any of the same should fall due, for six months, said Columbia Water Power Company should lose all interest under the contract of George Wallace with the Board of Trustees of the Columbia Canal and the city of Columbia, and also all interest under such deed as should be made to said company of the canal property, and that the said property should immediately vest in the city of Columbia, and that said company would thereupon execute a title deed to the city of Columbia therefor, and whereas also, the said Columbia Water Power Company did also agree in case at any time the market value of the said bonds should depreciate to or below ninety-five cents on the dollar, or any of said bonds should be hypothecated or sold as provided in said agreement, that said company should within thirty days after notice make up such deficiency, whether the same be in amount or value, by deposit of sufficient bonds selling not below par; and that if such deficiency should not be made up within six months from the date of
222 such notice then the same consequence to ensue as in case of default in payment of interest for six months.

"And the said Board of Trustees of the Columbia Canal do hereby bind themselves and their successors to warrant and forever defend all and singular the said premises unto the said Columbia Water Power Company, their successors and assigns, against ourselves and our successors, lawfully claiming or to claim the same or any part thereof."

Exhibit 6.

Deed from Columbia Water Power Company to Columbia Electric Street Railway, Light and Power Company, dated July 1, 1905, and recorded July 10, 1905.

The deed, after reciting the resolutions of the stockholders of both corporations, proceeded:

"Has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto the Columbia Electric Street Railway, Light and Power Company, the following described properties, to wit:

"1. All that property situate, lying and being in the State of South Carolina, in and near the city of Columbia, known as the Columbia Canal and the lands held therewith, acquired under the Acts of the General Assembly of said State with reference thereto, or otherwise, from its source at Bull's Sluice through its whole length, to the point where it empties into the Congaree River, at or near the mouth of Rocky Branch, including all lands, easements, rights of way, rights of overflow and appurtenances acquired by the Board of Trustees of the Columbia Canal in the development of the same, or otherwise, whether in Richland county or Lexington county, together with all and singular the rights, members, heredita-

ments and appurtenances to the said premises belonging or in anywise incident or appertaining, and together with all the rights and franchises conferred by the Acts of the General Assembly
223 of the State of South Carolina on the said Board of Trustees of the Columbia Canal, the property, rights, privileges and franchises hereby sold and conveyed being the same as were conveyed to the Columbia Water Power Company by the Board of Trustees of the Columbia Canal by deed dated the twentieth (20th) day of January, A. D. eighteen hundred and ninety-two (1892) (excepting therefrom the right of the Columbia Mills Company of South Carolina to that part of the western embankment of the canal conveyed to it on the second (2d) day of March, A. D. eighteen hundred and ninety-four (1894), by the Columbia Water Power Company, subject, however, to the conditions, limitations, provisos and exceptions, set forth and declared in the said deed of conveyance. Also the power station of the Columbia Water Power Company, located on the western bank of the canal near Gervais street, in the city of Columbia, including the turbine water wheels, dynamos, governors, switchboards, and other machinery therein (excepting a switchboard and connections which belong to the State), and also all transmission lines of poles and wires, and all transformers and other electrical apparatus for the delivery of electrical current for power and lighting purposes belonging to said company but installed on the premises of the several parties with whom it has contracts for supply of power.

"And also all easements, rights of way and rights of overflow acquired by the purchase or condemnation by the Columbia Water Power Company subsequent to the deed of conveyance of date twentieth (20th) January, A. D. eighteen hundred and ninety-two (1892), above mentioned, and now belonging to said company."

The deed then, in sections numbered 2 to 8, included various other parcels or lots of land, and then proceeded:

224 "This conveyance is made subject to the mortgage of the Columbia Canal, executed by the Board of Trustees of the Columbia Canal to Wilie Jones, George K. Wright and J. Q. Marshall, Trustees, of date the first day of February, A. D. 1888, which secures an issue of two hundred thousand dollars ($200,000) of bonds, which said bonds and mortgage the Columbia Electric Street Railway, Light and Power Company agrees to pay and discharge.

"Together with all and singular the rights, hereditaments, members, appurtenances to all and several the said premises belonging or in anywise incident or appertaining.

"To have and to hold all and singular the premises before mentioned unto the said the Columbia Electric Street Railway, Light and Power Company, its successors and assigns forever.

"And the said the Columbia Water Power Company does hereby bind itself, its successors and assigns to warrant and forever defend all and singular the said premises unto the said the Columbia Electric Street Railway, Light and Power Company, its successors and

assigns, against itself, its successors and assigns, lawfully claiming or to claim the same or any part thereof."

EXHIBIT 7.

Map of Columbia Canal by Byron Holley. Omitted from case on appeal. Either party may produce and exhibit the original "Exhibit 7" to the Court, and if the Court desires a copy of this exhibit, same will be furnished them by appellant.

EXHIBIT NO. 8.

Written communications between Canal Commission of 1917 and defendant, and also transcript of certain portions of minutes of Commission.

A. Letter of March 28, 1917, from Commission to Defendant:

225 GENTLEMEN:

By an Act of the General Assembly of the State of South Carolina, entitled

"An Act to declare that the Columbia Canal, and its appurtenances, and the interest of the State in and to the Columbia Canal, authorized to be transferred under an Act entitled 'An Act to incorporate the Board of Trustees of the Columbia Canal, to transfer to the said Board the Columbia Canal, with the lands now held therewith, and its appurtenances, and to develop the same,' approved December 24th, 1887, and Acts supplemental or amendatory thereof, shall revert to the State by reason of and on account of the violation of the conditions contained in said Acts, and to provide provisions relating to the operation, management, control, disposal or sale of said canal," approved on the 12th day of March, 1917—

it was declared that the conditions of the Act of the General Assembly of the State of South Carolina, approved the 24th day of December, 1887, and the Acts supplemental and amendatory thereof, had not been complied with, but that the same had been disregarded, and by reason thereof the right, title and interest of the State to the said Columbia Canal, its appurtenances and the lands held therewith, so transferred by virtue of said Acts, had been forfeited and reverted to the State.

Further, by said Act, the Attorney General and the Chairman of the Judiciary Committee of the Senate and House of Representatives, the Chairman of the Finance Committee of the Senate and the Chairman of the Ways and Means Committee of the House of Representatives, were empowered, authorized and directed, or a majority of them, ninety (90) days' after the approval of this Act, to make such re-entry for and in behalf of the States as may be

necessary and proper under the circumstances, and to take
226 such steps as may be lawful and proper in the premises to obtain possession and control of the property of the said Columbia Canal, its appurtenances and the lands held therewith, and the improvements placed thereon by those in possession, etc.; and, further, to take such possession, control and direction of the development of the water power originally contemplated by said Act, and to dispose of the same in such way as they may deem advisable and proper, for the interest of the State.

For your information, and to save the trouble of directing your attention in detail to the provisions of said Act, I hereto attach to this letter a copy thereof.

At a meeting held on the 22d instant, upon the call of the Attorney General, it was resolved by the majority of the officers above mentioned.

"That the Attorney General be requested, if he deems advisable to communicate with all persons necessarily affected by the provisions of the Canal Act, approved March 12, 1917, and to ascertain such information as may be necessary in the premises, and give notice, such as he deems sufficient, to each and all persons concerned, and to take such preliminary steps as in his judgment are in keeping with the provisions of the Act and as may be in furtherance of the carrying into effect its provisions, and to report the same to this Commission at its next meeting."

It was also further resolved:

"That the Attorney General notify all interested parties that a hearing would be granted them at four o'clock p. m. on Monday, the 2d day of April, 1917." and, a call for a meeting of the Commission
was passed for further action with regard to their duties, and
227 to take such steps under the Act as they may deem proper, to be held on Monday, the 2d day of April, 1917.

In accordance with this resolution, and said Act, I beg to give to you the notice contemplated by said resolution, and to call to your attention especially the provisions contained in paragraphs three, five, six and seven of said Act. The officers above mentioned will be very glad for you, or through any representative that you may select, to appear before them at the said date and make such statements and proposals, with regard to the action contemplated in said sections, or other sections of the statute, as you may see fit to make, and to assure you that they shall be very glad to take up and consider any matter that you may desire to present to them.

If the time which has been fixed for the next meeting of the Commission be not sufficient, I will thank you to indicate what time, within a reasonable limit, you would desire to appear before the Commission.

B. Letter of March 30, 1917, from defendants to Commission:

MY DEAR SIR:

I have your letter of March 28th with reference to the Columbia Canal, and informing me that there will be a meeting of the Commission created by the Act recently passed by the General Assembly on April 2d.

You suggest that if this day does not give sufficient time, that I express a wish for some other day. It will be necessary for me to confer with other interests before appearing before your Commission, which I am arranging to do on April 12th, which is the earliest day such meeting can be arranged, and as soon as that meeting has been concluded, I will write you requesting that you call a meeting of your Commission.

228 In the meantime, we should be very glad to meet with your Commission at any convenient date that you may suggest for a discussion of this matter, but I deem it only fair to advise you that I will be in no position to make, or receive, any definite proposition until I have received the authority to act, which I expect to be given me at the meeting above referred to.

You understand, of course, that this communication is privileged and is not to be construed or considered as any admission of any obligation on our part.

C. Statement by J. B. S. Lyles, on behalf of defendant, to Commission, at its meeting of April 17, 1917:

Mr. Chairman and Gentlemen of the Commission: I represent in this matter the Columbia Railway, Gas and Electric Company, and am very sorry that on account of unexpected circumstances, we are not in a position to talk to the Commission this morning. Mr. Robertson, the president of this company, addressed a letter to the Attorney General, stating that in so far as this company was concerned, he could not act until he had been authorized to do so by a meeting of this company, held on the 12th instant. We had expected at that time that Mr. Robertson would get back from New York, and Mr. Elliott and I expected to see him on yesterday and appear before this Commission this morning in a definite manner, but Mr. Robertson became engaged with General Wood in connection with this cantonment, in which he is very much interested as a citizen of Columbia, and in which he has done a great deal of work, and will not be back until tomorrow, so we are without authority to act. We didn't know until Saturday night that he had changed his plans about returning and immediately Mr. Elliott got in touch with the Attorney General. Now, we don't want

229 the Commission to think we are in any way trying to delay this matter, because, as you gentlemen know, it is a very complicated situation and our efforts have been to get down to some definite basis upon which to take the matter up with this Commission. As I stated before, the meeting of the directors has been held

in New York, but until we have a conference with Mr. Robertson we are unable to act.

Mr. J. T. Liles: Do you think you will be in a position to make a proposition tomorrow?

Mr. J. B. S. Lyles: I could not say positively when Mr. Robertson will get back. This morning at ten o'clock he had not wired whether or not he would be here. He is interest in getting the camp in Columbia and he and General Wood are in New York.

Mr. Sinkler: Would your client be in a position to submit a written statement of your proposition to this Commission?

Mr. Lyles: We will be just as soon as we have a conference with our clients. That is what we intend to do.

Mr. J. T. Lyles: At what time do you think your company would be in position to submit such a statement?

Mr. Lyles: Within a day or so after Mr. Robertson gets back — certainly by next week.

Mr. Sinkler: And after such proposition had been made, oral statements would be unnecessary?

Mr. Lyles: I should think so. I take it that this Commission has not made any proposition to this company, but has invited a proposition from the company, and just as soon as we can find out what the company wishes, we will submit the written proposition.

Mr. Peeples: If Mr. Roberston returns today or tomorrow and the Commission is in session, could you make a proposition to the Commission tomorrow?

230 Mr. Lyles: If he gets in today, which I think is very doubtful, we could make the proposition tomorrow, but we would like to have a couple of hours to confer and frame the proposition. While it might be done, I don't see how we could by tomorrow. I wanted the Commission to understand that this situation was one we could not help and we are not trying to delay matters.

D. Letter of April 25, 1917, from defendant to Commission:

GENTLEMEN:

The Columbia Railway, Gas and Electric Company would respectfully make to you the following offer of compromise under the terms of the Act of the General Assembly of South Carolina, approved the 12th day of March, A. D. 1917, relating to the Columbia Canal.

The Columbia Railway, Gas and Electric Company would call to your attention that the proponents of the Act of 1917, at the hearings before committees of the General Assembly, represented that the Columbia Canal could be completed below Gervais street down to the Congaree River a few yards above the mouth of Rocky Branch, as it is claimed was contemplated by the Act of December 24, 1887, at an expense of seventy-five thousand ($75,000) dollars. The Columbia Railway, Gas and Electric Company takes the position that there is no moral or legal obligation or duty resting upon it, as owner of the Columbia Canal, or otherwise, to complete the canal below Gervais street, as stated above, and that it has violated no

condition contained in the Act of 1887, or otherwise imposed. Notwithstanding this, the Columbia Railway, Gas and Electric Company as a compromise and settlement of this whole matter will pay to the State of South Carolina fifty thousand ($50,000) dollars for a release from any condition, obligation or duty on said com-
231 pany as the owner of the Columbia Canal, or on the owner of the Columbia Canal, whoever the same may be, to extend or complete the canal below Gervais street down to the Congaree River, a few yards above the mouth of Rocky Branch, or otherwise, as it is claimed was contemplated and required by the Act of December 24, 1887, entitled "An Act to incorporate the Board of Trustees of the Columbia Canal, to transfer to the said Board the Columbia Canal, with the lands now held therewith, and its appurtenances and to develop the same."

The condition of this offer is, that if the State of South Carolina shall extend or complete said Columbia Canal, then all property rights and interests in the same and its appurtenances, increments and improvements as so extended or completed are to vest and inure to and in the Columbia Railway, Gas and Electric Company or the present owner of the Columbia Canal, subject to all burdens, duties and obligations imposed upon the owner of the said Columbia Canal under and by virtue of the Act of December 24, 1887, excepting, of course, the obligation or duty to extend or complete the Columbia Canal below Gervais street down to the Congaree River, or otherwise.

The above sum of money is to be paid upon the approval of an Act duly enacted by the General Assembly of South Carolina expressly reciting and incorporating the terms of the compromise above specified and enacting the same in the form of a deed of release from the State, for the benefit of this company and all and any other persons or corporations who may have or may claim to have any right, title or interest in said Columbia Canal or its appurtenances, increments or improvements growing out of and derived from and through said Act of 1887 or otherwise, and also providing for the vesting in the present owner of the Columbia Canal all rights
232 and interest in said canal as extended or completed, if same should be extended or completed as above referred to.

This is a privileged communication and is made as an offer of compromise, and it is expressly stated that this is no admission that the Columbia Railway, Gas and Electric Company, or any other person or corporation claiming or having any right, title or interest in said Columbia Canal, its premises, appurtenances, increments or improvements, is in anywise in default under any condition, obligation or duty imposed by the Act of 1887 or otherwise, and in the event that this offer of compromise is not accepted, this communication is not to be made use of or divulged in any controversy, proceeding or litigation that may subsequently arise concerning or affecting this matter.

E. Letter of May 28, 1917, from Commission to defendant:

DEAR SIR:

At a meeting of the Commission, named under the Act approved the 12th of March, 1917, called and held at Charleston on the 23d instant, your communication of the 28th of April, 1917, enclosing proposition to said Commission, was read to and considered by the Commission and ordered made a part of its records.

The Commission, upon motion unanimously carried, rejected the offer made in your letter and the same was "refused in toto," and the Attorney General was requested to notify you of such action. I beg, therefore, to advise you accordingly.

Should you see fit to submit any other or further proposition with regard to the control and disposition of the Columbia Canal, which was placed by said Act under the control and disposition of said Commission, which proposition shall contain such arrange-
233 ments as may be satisfactory to this Commission, the same will be considered within the time allowed by statute, to wit: ninety days from the approval of said Act. Unless such arrangements or agreements of the parties claiming to have any right, title or interest in the premises be satisfactory, we will proceed in accordance with the directions given to us by the terms of said Act.

F. Letter of May 31, 1917, from defendant to Commission:

DEAR SIR:

I beg to acknowledge receipt of your letter of May 28, 1917, reporting the abrupt action of your Commission on May 23, five days previous to your letter, taken on the proposition of the Columbia Railway, Gas and Electric Company, submitted to you, as Chairman, on April 25, twenty-eight days previous to the meeting of the Commission.

Your letter of March 28th was the first intimation this company had of the desire of your Commission to receive any proposition from it and we then assumed that your Commission was at least willing to reach some compromise of this dispute as contemplated in Section 5 of the Act. Accordingly, I wrote you on March 30th frankly advising you of the necessity and time involved in calling a meeting of the directors of the company and telling you of my intention to do this and advise you of the proposition I might be authorized to make. The meeting of the directors of this company was duly called and held in New York on April 12th, but I was unexpectedly detained there in the work I was doing as chairman of a committee of the Columbia Chamber of Commerce. In the meantime, about April 17th, Mr. Lyles appeared before your Commission and having explained the unexpected and unavoidable delay caused by my absence, was given to understand that your Commission de-
234 sired this company to submit a definite proposition in writing to you as chairman and that then a meeting would be called, at which this company would be invited or at least given the

opportunity to appear for a reasonable and friendly discussion in a real effort to compromise any difference that might exist. It was in accordance with this understanding that our proposition of April 25th was written, and in our letter of transmissal we said: "We are ready to appear before the Commission at its pleasure."

Before making our proposition of April 25th, we had been given no indication of the attitude of your Commission and were unable to determine whether it had chiefly in mind the promotion of the claimed public interest by way of navigation or the securing to the State of compensation for property rights claimed to be vested in it. Our bona fide information has always been that the suggested navigation purposes were impracticable if not impossible of accomplishment and we really thought that your Commission had chiefly in mind the securing to the State of compensation for p-operty rights claimed by it—yet we placed our proposition upon a compromise basis of the very claims of the proponents of this legislation, knowing that the State could make use of this money to promote navigation via the canal if this was thought best. We remain still at a loss to see how the proposition requested from this company could have been made upon any other basis, and it must be conceded to have been at least a substantial and bona fide offer.

Notwithstanding these circumstances this company stands today, within eleven days of the expiration of the time allowed, without having been invited or afforded the opportunity to appear before your Commission for a reasonable discussion of its proposition—this company is today utterly uninformed either of the objections that your Commission has to its proposition of April 25th or as to what kind or character of proposition your Commission would deem advisable and proper to protect the interests of the State in this matter.

If your Commission deems it proper to enter into any reasonable discussion of this matter for the purpose of accomplishing a compromise, as contemplated by Section 5 of the Act, or if your Commission should see fit to indicate what proposition would meet its approval, this company stands ready and willing, as it has stated it has always been, to give the suggestions of the Commission the consideration, confidence and privilege to which they are entitled and which it respectfully asks for this communication.

This is a privileged communication written in an effort to compromise and is no admission of any rights in the State of South Carolina as claimed under this Act or otherwise.

In order to economize time, we are sending a copy of this communication direct to each member of your Commission.

G. Letter of June 1, 1917, from Commission to defendant:

DEAR SIR:

We acknowledge receipt of your letter dated the 31st ultimo.

Desirous that there should be no misunderstanding and in order to correct the errors stated in such letter, in which you claim that you

have not been given sufficient time or accorded sufficient hearing, I will first make a statement from the records.

The committee has not construed the Act, nor can we perceive that anyone else would, to require us to make a proposition to you or any other party. The manner of our proceeding is left, by statute, to our good sense and to our fairness, having solely in
236 view the interests of the public and State at large, as set forth in the statutes of this State covering a period of over thirty years.

The present Act was approved on March 12, 1917, three weeks after the adjournment of the Legislature. Doubtless you, yourself, and certainly your representatives who were apparently in opposition to the measures, knew that it had passed and was before the Governor for three weeks, and certainly after its approval on March 12th, your knowledge became conclusive; and certainly under provisions two and five of said Act you knew that the special privilege was given to you of making such arrangements or agreements with the Commission, within ninety days from its approval, and that the Commission would entertain any and determine whether any proposition you might make to us would be satisfactory, which time expires on the 10th of this month. During this entire period and up to the date of the first meeting called by the Commission you certainly had all this time to consider what proposition or propositions you could present to this Commission. You sat perfectly quiet and did nothing; you never sought any meeting of the Commission or gave any attention to the privileges which had been accorded you.

On March 22d a meeting of the Commission was had, which was known before and published in the newspapers of your own city. But no attention was paid to that, and at that meeting there was no communication from you whatever. A resolution was offered by Senator Sinkler, and adopted, that the Attorney General notify all interested parties that a hearing would be granted them at four o'clock p. m. on Monday, the 2d day of April, 1917. My recollection is that a notice of the meeting was carried in the newspapers published in this city. But that particular matter may be
237 put out of view, inasmuch as on the 28th of March a letter was addressed to you notifying you of such meeting and its objects, pointing out the provisions of the Act, and directing your attention thereto.

As I had stated that if the time suggested in my letter of the 28th, did not give you sufficient time it was for you to state what time you would be ready to take the matter up. In your suggestion you stated that it was necessary for you to confer with other interests before appearing before the Commission, with whom you were arranging such conference on April 12th, and as soon as that meeting had been concluded you would write the Commission requesting that "you call a meeting of your Commission." It is true that you stated that you suggested that you would be glad to meet with the Commission for a discussion of this matter, but you deemed it only fair to advise us that you would be in no position to make or receive any definite proposition until you had received the authority to

act, which you expected to be given you at the meeting above referred to.

The meeting, which was called for April 2d, was held and your reply was read to the Commission and became a part of the records of its minutes. In view of your letter, no action was taken with regard to the Columbia Canal, but the time was, as asked by you, extended.

On April 17th, at a meeting called pursuant to notice, the representative of your company, Mr. Lyles, appeared and made a statement which was filed as a record of the proceedings. He requested an extension of time on account of the "unexpected circumstances we (that is, Columbia Railway, Gas and Electric Company) are not in position to talk to the Commission this morning." In view of this statement and notwithstanding the length of time which had elapsed,

you were allowed to take such time as was convenient to
238 you, until the next meeting of the Commission which was called for April 26th.

In a communication, of date, April 25th, 1917, you submitted "an offer of compromise," under the terms of the Act of March 12, 1917, relating to the Columbia Canal, and also enclosed a letter in which you stated you enclosed a communication to the Commission and used the following language: "We are ready to appear before the Commission at its pleasure." I acknowledged the receipt of your letter on April 28th, and stated it would be made a record of the office, and called a meeting for May 23d, in Charleston. The meeting which had been called for April 26th was postponed until the 23d of May, because of the official duties of the officers of the committee which prevented their being present—notice of the matter was carried in the press.

At the meeting of the 23d of May, as I communicated to you, your offer of compromise was read and considered and ordered made a part of the records, and, upon motion, it was unanimously refused in toto, and the Attorney General directed to so notify you.

Notwithstanding this statement in résumé, you seem to complain that you have not been given time enough. To do what? First, to have a discussion with us, at which you were neither in position to make any definite propositions, definite arrangements, nor to reach definite conclusions, nor to be bound by any suggestions you should make. This Commission has been created for the purpose of protecting the interests of the State in a practical and positive way, without duplicating its meetings and increasing its expenses to be paid by the State.

Your letter further states that March 28th was the first intimation your company had of the desire of the Commission to receive any proposition from it.

239 In view of the recitation of these meetings made to you, how can you make such a statement, when, on April 17th, your representative appeared before the committee and asked to have the meeting adjourned on account of your absence and that you were preparing a communication with regard to the matter? Or, how could you read the Act of the Legislature and make any assumption of the kind you state you did? And further, in view of the letter

of the 28th of March which I mailed to you? In inviting on March 28th, a proposition from you, we supposed that your proposition would be to the point. Instead of that, your letter, so far as I can read it, shows not the slightest deference to the General Assembly which constituted us a committee to act in behalf of it, and it would be stretching the most friendly vision too far to say, from its terms, that it was intended to be in good faith or was capable of affording the basis of any reasonable or friendly discussion to have or to advance any real effort to compromise the differences that might exist.

The Commission, after giving it the most courteous consideration that it was capable of, rejected your proposition in toto and we still reject it, either as a basis of any reasonable or fair compromise, or as an effort to bring about the adjustment which the Legislature had in view in passing the sections of an Act to which I have alluded.

You are not justified in making the statement contained in paragraph three of your letter, that you had been given no intimation of the attitude of the Commission, etc. On the contrary, my letter to you calls your attention to every phase of the Act, and while the interests under consideration may be more directly in those who are now engaged in or who propose to use these streams as navigable, it by no means follows or can be assumed that we have any
240 such thought chiefly in our minds, or propose to protect or encourage their interests over those of other citizens, or of the interest which attend and depend upon the development of power upon the canal, so as to prevent the monopoly of the sale of power to the citizens of the community within reach of an operating plant in the city of Columbia, or to engage in other enterprises which would be more upon an equality with other cities with regard to the supplying of electric power, and other opportunities of opening up and aiding the Government as far as we could, in promoting the navigable capacity of the large water streams which converge into the Santee River and pass by the city of Columbia.

We are not the organ, as you would intimate, of obtaining compensation for property rights which are claimed by citizens equally interested in the property of the State, as you are; nor are we your organ in attempting to protect your interests at the sacrifice of theirs. The information which you allude to as to the practicability of using the streams for navigable purposes may appear to you to be without foundation, but so far as we are officially informed your information has no basis of fact, and it would be impossible so far as we are officially advised for you to substantiate your assertion by any official inspection or examination by the Federal officers of the United States Government and their reports thereon. We put out of view any further remark upon that paragraph of your letter.

Notwithstanding, however, that we had rejected your proposition we did in the most courteous way, notifying you of same; and invite you, if you so desire, to make any other or further proposition before the expiration of ninety days after the approval of the Act that you might desire to make, and we will entertain it and give it due consideration.

211 Any reply you make to this letter please address to each member of the Commission.

H. Letter of June 6, 1917, from defendant to Commission:

GENTLEMEN:

We acknowledge receipt of the letter of your chairman, dated June 5th.

As this communication indicates that your Commission does not care to enter into any discussion of the matters in controversy, or to give this company any opportunity of meeting your Commission for such purposes, notwithstanding the suggestion to this effect contained in your letter of May 31st, and as this communication in nowise relieves our ignorance as to what kind or character of proposition your Commission would deem advisable and proper to protect the interests of the State in this matter, as suggested in our letter of May 31st, we find ourselves with utterly no basis upon which we can proceed to make any further or other proposition in the premises.

We regret that your Commission has seen fit to keep us in entire ignorance of your attitude in this matter and to afford us no opportunity for even the most limited discussion, in an effort to adjust the differences involved, notwithstanding that this slight consideration could have been accorded us, most easily and with all convenience to your Commission, at your meeting held in Columbia on June 4th, of which we were only subsequently advised by the newspaper reports; at which meeting we presume our letter of May 31st was considered and answered.

I. Minute of June 11, 1917:

Pursuant to adjournment of the Commission on June 4th, the Commission met at 10 o'clock a. m., on June 11th, in the
212 office of the Attorney General. Members of Commission present: Messrs. Peeples, Sinkler and Liles. Minutes of previous meeting read and approved.

Messrs. William Elliott and J. B. S. Lyles, attorneys for the Columbia Railway, Gas and Electric Company, appeared and made statements, as follows:

Mr. Elliott: We have come before the Commission today for the purpose of ascertaining whether there is any possibility of our arriving at an agreement with the Commission. We made an offer in writing to the Commission, which seemed proper, but the offer was rejected, as indicated to the Columbia Railway, Gas and Electric Company, in toto, and that leaves us in the position of not knowing what line of compromise the Commission would consider or accept. Our idea is to find out upon what basis there can be affected a settlement or compromise.

Mr. Sinkler: I would like to ask if you have another proposition to make—a definite proposition to make.

Mr. Elliott: Along what line, Senator?

Mr. Sinkler: Any line that you see fit.

Mr. Elliott: The situation is this: We don't know, from the attitude of the Commission, whether they want a money settlement, a completion of the canal, if so, upon what terms; we don't know what the idea of the Commission is as to proposing some compromise measure. It is very difficult for us to make an offer to meet with the view of the Commission without knowing their views.

Mr. Sinkler: You have made us one definite proposition for so much money, which the Commission rejected, and it seems to me you should make another definite proposition. We are here to receive any proposition of any kind or character you see fit to offer us.

243 Mr. Elliott: Was the proposition rejected because the amount named was insufficient—was that the basis of the rejection?

Mr. Sinkler: The proposition was rejected because it was unsatisfactory to the Commission.

Mr. Elliott: Unsatisfactory because we mentioned the money consideration, or because of some other reasons?

Mr. Sinkler: Simply because we didn't think it a proper or satisfactory proposition.

Mr. Elliott: Has the Commission in mind a proposition which, if we make, will be accepted?

Mr. Sinkler: My attitude in this matter is simply this: We are here to receive any definite proposition or propositions from you all, and not to offer any proposition to you.

Mr. Elliott: We understand that.

Mr. Sinkler: If you all can offer, no matter what that proposition is, a concrete proposition, a definite proposition, we would be glad to hear it; those are my views.

Mr. Peeples: I don't think, Mr. Elliott, the Commission is in a position to suggest any proposition to you gentlemen. We can only entertain and pass upon the proposition offered to the Commission.

Mr. Elliott: It seems to me the Commission should define its policy so far as to say whether they will accept a proposition along certain lines, or indicate in some way what their views are.

Mr. Sinkler: Have you any proposition to place before the Commission proposing to complete the canal and carry out the contract with the State?

Mr. Elliott: Mr. Sinkler, the offer which we made in writing contained the offer of an amount and then, I may say, proposes an offer of compromise. Was it objected to because of that amount

244 or because the terms contained therein were not satisfactory?

Mr. Peeples: The offer didn't meet the approval of the Commission in any way.

Mr. Elliott: Because of the terms or amount stated?

Mr. Peeples: Just as expressed in the minutes.

Mr. Elliott: Senator Sinkler, answering your question, if the Commission has formulated any plans or specifications or terms as to how the canal can be completed, we might consider that as a basis of compromise. We don't know what construction the Commission has placed on the Act—the obligation of the Street Rail-

way Company or anyone else. We would like to ask the Commission this question: If we increase the amount named in the offer which our clients made, is there, by that means, any way of arriving at an agreement with the Commission?

Mr. Sinkler: We could not act on any offer until that offer is submitted, and, as I stated before, Mr. Elliott, we would be willing to entertain any proposition, one, two or three, or any number of propositions that you desire to make, but we can't act upon a proposition until we receive it in definite form.

Mr. Elliott: Is the Commission ready and willing to recommend to the Legislature a proposition if it meets the approval of the Commission?

Mr. Sinkler: We must see that proposition before we can exercise our discretion.

Mr. Liles: Have you gentlemen in mind a proposition you desire to make?

Mr. Elliott: It is very difficult to answer that question because of the numerous angles of the thing. We are desirous of arriving at an agreement or settlement or compromise with the Commission.

245 Mr. Liles: You have considered, though, another proposition that you will make to the Commission?

Mr. Elliott: We have considered every proposition that we thought should be acceptable to the Commission. We don't want to strike in the dark, but we want to arrive at an agreement and are willing to do whatever is necessary, and we would like to discuss the proposition freely. We are not here with the desire to make up any record, but we want to arrive at a settlement

Mr Sinkler: We don't know how we can arrive at any settlement until the proposition is submitted to us in definite form. You submitted one proposition, and it was not accepted. If you will submit any number of propositions in writing, then we will know how to answer.

Mr. Elliott: Just consider our position for one moment take the question of the advisability of co-operating with the city of Columbia. It is, I understand, proposing to issue bonds for the purpose of buying a municipal warehouse, and it is, I understand, necessary to get the co-operation of Congress. The Committee on Rivers and Harbors has refused to appropriate money where the municipal warehouses are not owned by the city, but will appropriate money where they are owned by the city. The city of Columbia is ready to buy municipal warehouses. We don't know but that some compromise may be made, the State's co-operating with the city, which will be advantageous to every one. If there is any way of discussing it, we would like to do so, but it is very difficult to make a series of propositions without knowing whether the Commission is going to accept or refuse them.

Mr. Liles: In your consideration of this matter, have the people you represent thought of proposing to this Commission to carry out your contract with the State?

246 Mr. Elliott: They have thought of it from every angle. The question of the contract with the State is a question involving the possibility of a variety of constructions. The only way we can arrive at that is to join upon some ground and discuss the propositions freely.

Mr. Liles: Mr. Elliott, if there are different constructions, and I suppose there are, have your people considered proposing to the Commission to carry out the contract in accordance with your construction?

Mr. Elliott: Senator, our consideration of the Acts puts a light on the thing from our standpoint—well, we don't view the thing as placing at this time any burden upon us. Without prejudice, we are ready to avoid the legal discussions and arrive at a settlement. I will make this suggestion: We are both here sparring on the record, so to speak, because we are being asked questions on each side which neither side is answering: I make the proposition that we go into an informal discussion to ascertain if there is any possibility of our arriving at a settlement.

Mr. Peeples: The Commission, as indicated to you by Senator Sinkler, has nothing to go upon until a proposition is laid before it; but, nevertheless, if it is the pleasure of the Commission to concur in Mr. Elliott's suggestion, we will do so.

Mr. Sinkler: I presume you mean by informal that no notes be taken of our discussion.

Mr. Elliott: I mean in an effort to compromise, which is the law and the policy of the Courts, not to take advantage of anyone or anything that is said in the effort to compromise, and we would be willing to discuss this thing informally in that spirit.

Mr. Peeples: You mean that no statements made under these conditions shall be binding or come up afterwards?

247 Mr. Elliott: Yes, I mean that. Our position is this. Everything we say we are bound to, and the Commission is not.

Mr. Liles: From your statement a moment ago, you take the position that there is no burden upon the Columbia Railway, Gas & Electric Company at this time. Is that statement based upon the assumption that the contract is null and void?

Mr. Elliott: We are here to endeavor to arrive at an agreement with the Commission under the terms of the Act. If we are going to discuss the legal aspects of the case, I don't think it will profit us in arriving at an agreement. I will say, however, taking the legal aspect, we deny any liability for the completion of the canal, and claim that we have fulfilled our duty in the premises entirely, and propositions we make, as we made before, are privileged propositions for the sake of a settlement and without prejudice.

Mr. Sinkler: Gentlemen, in the first place, speaking for myself individually, and I think for the Commission, it is not a question of sparring on the record, but our position is that we are very glad to entertain any proposition you gentlemen may make, and we will be glad, for the interest of all concerned, if this matter could be amicably determined upon, but it is also the position of the Com-

mission to have something in clear, definite form, in the nature of one proposition, two propositions, or a series of propositions to act upon. The kind and character of the proposition and number of propositions is a matter for you to decide. When we receive them, we can then act upon them intelligently; until we receive them, we can do nothing.

Mr. Elliott: What answer does the Commission make to my proposition, in an effort to fulfill the wishes of the Act and
248 the spirit of the law, to enter into a discussion for the sake of arriving at a compromise, which will not be binding upon either party and be privileged?

Mr. Sinkler: I think that is sound doctrine, and has always and should always receive the approval of the Courts to prevent any litigation on any subject whatever. We represent, not a private corporation, but the State and a political body. Any proposition you gentlemen may make we will treat without prejudice, and you are at liberty to make them along those lines. So far as our minutes are concerned, why, as you know, we are compelled to keep those minutes. So far as the proposition you may offer, we will be very glad to receive them, without prejudice, in the sense we always extend to each other in striving to arrive at a settlement of a case without prejudice.

Mr. Elliott: I would like to ask the Commission again, not for the sake of being persistent, but with a definite object in view—referring to our written proposition to the Commission, is there anything in that letter, so far as the terms of the letter are concerned, which are objectionable to the Commission or a bar to a settlement? If the letter does not contain any matter that is a bar, we would like to discuss the revision of it, and we may find something that would meet the minds of the Commission.

Mr. Sinkler: The Commission has considered what we thought a definite proposition. That proposition is unsatisfactory to the Commission, and, therefore, any other proposition in order would be on your part.

Mr. Elliott: If we were to consider increasing the amount mentioned in that letter, would the Commission consider a proposition? If we amended that letter by increasing the amount.

Mr. Sinkler: Whatever new proposition you may make the Commission will be glad to pass upon it and approve or disapprove it.

249 Mr. Elliott: If there are any objectionable terms in that letter which the Commission thinks should be revised, we stand ready to consider the revision of them, subject to all of the claims of privileges in the letter, and in exactly the same manner and method as made in the letter, we make the proposition to the Commission that the sum of $850,000 be increased to $875,000—the total amount in the letter.

Mr. Sinkler: Is that the present concrete proposition?

Mr. Elliott: Yes, sir.

The Commission requested that the proposition be put in writing and this was done. Letter follows:

"Columbia, S. C., June 11, 1917.

To Hon. Thos. H. Peeples, Attorney General, Chairman, and the Members of the Canal Commission under the Act of March 12, 1917, Columbia, S. C.

GENTLEMEN:

Referring to its letter of April 25, 1917, containing a previous offer of compromise, made by the Columbia Railway, Gas & Electric Company, this company would, subject to the terms and conditions of such letter and claiming all privileges set forth therein, make a further offer by striking out the amount of $50,000 offered in such letter and inserting in lieu thereof the sum of $75,000, so that said offer would be an offer of $75,000 under the terms, conditions and privileges of such letter of April 25th.

This company would earnestly request the Commission to advise it if any of the terms and conditions contained in such letter of April 25th are objectionable, because this company feels that if the amount now offered is satisfactory, an agreement can be reached as to the terms and conditions, and will be glad to co-operate
250 with the Commission to accomplish such agreement.

Very respectfully,

COLUMBIA RAILWAY, GAS & ELECTRIC COMPANY.

By Its Attorneys WM. ELLIOTT
J. B. S. LYLES."

Mr. Liles: Mr. Elliott, is this your final proposition?
Mr. Elliott: Yes, sir.

The Commission, after going into executive session to consider the above proposition, addressed the following letter to the attorneys for the Columbia Railway, Gas & Electric Company:

"Columbia, S. C., June 11, 1917.

Messrs. Wm. Elliott and J. B. S. Lyles, Attorneys for Columbia Railway, Gas & Electric Co., Columbia, S. C.

GENTLEMEN:

We have given careful and mature consideration to the proposition contained in your letter of this date, and after due deliberation, we feel that the acceptance of such an offer would be in derogation of the rights of the State, and are constrained to reject the same.

Regretting that we could not arrive at an amicable adjustment of this matter, we are.

Yours very truly, THOS. H. PEEPLES,
Chairman."

J. Resolution of August 10, 1917:

The following resolutions were unanimously adopted:

Resolved, That the Commission hereby authorize and empower the Hon. Thomas H. Peeples, as Chairman of the Commission, on behalf of the Commission, to re-enter and take actual possession of the property of the State of South Carolina, known as the Columbia Canal, and all property thereon and connected herewith, under authority of an Act entitled "An Act to declare that the Columbia Canal, and its appurtenances, and the interest of the State in and to the Columbia Canal, authorized to be transferred under an Act entitled 'An Act to incorporate the Board of Trustees of the Columbia Canal to transfer to the said Board the Columbia Canal, with the lands now held therewith, and its appurtenances, and to develop the same,' approved December 24, 1887, and Acts supplemental or amendatory thereof, shall revert to the State by reason of and on account of the violation of the conditions contained in said Acts, and to provide provisions relating to the operation, management, control, disposal or sale of said canal." We have this day attached our signatures to the notice of re-entry.

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Resolved, That the counsel for the Commission are hereby authorized, on behalf of the Commission, to communicate with the Columbia Duck Mills in regard to their letter of June 11, 1917, and advise them of the position of the Commission.

Resolved, That in the event the parties in possession of the Columbia Canal and its appurtenances shall surrender the said Columbia Canal and its appurtenances peaceably and in accordance with the provisions of the Act relative thereto, the suitable agents, contractors and other persons necessary for the temporary operation and care of said canal and its appurtenances, be employed by the Attorney General, upon such terms and for such compensation as he may deem advisable, subject to the ratification of the majority of the officers constituting the Commission. That in the meantime the Attorney General be, and he is hereby, authorized to receive from the Columbia Duck Mills such rental or compensation for the use of the water power that said corporation has heretofore been paying for use of water power under the terms of its original contract, and that the said Attorney General do pay, out of funds received from said corporation, the necessary charges of such agents, contractors and other persons necessary to operate and care for said canal and its appurtenances.

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K. Letter of August 10, 1917, from Commission to defendant:

GENTLEMEN:

The undersigned, the Attorney General of the State of South Carolina, the Chairman of the Judiciary Committee of the Senate, the Chairman of the Judiciary Committee of the House of Representatives, the Chairman of the Finance Committee of the Senate, and the Chairman of the Ways and Means Committee of the House of Representatives, acting under the authority of an Act entitled "An Act to declare that the Columbia Canal, and its appurtenances, and the in-

terest of the State in and to the Columbia Canal, authorized to be transferred under an Act entitled 'An Act to incorporate the Board of Trustees of the Columbia Canal, to transfer to the said Board the Columbia Canal, with the lands now held therewith, and its appurtenances, and to develop the same,' approved December 24, 1887, and Acts supplemental or amendatory thereof, shall revert to the State by reason of and on account of the violation of the conditions contained in said Acts, and to provide provisions relating to the operation, management, control, disposal or sale of said canal," approved the 12th day of March, A. D. 1917, who, under Section 2 of said Act, were empowered, authorized and directed, or a majority of them, ninety (90) days after the approval of said Act, to make such re-entry for and in behalf of the State as may be necessary and proper under the
253 circumstances and to take such steps as may be lawful and proper in the premises to obtain possession and control of the property of the said Columbia Canal, its appurtenances and the land held therewith, and the improvements placed thereon by those in possession, which have become a part and parcel of said canal, unless the claimants enter into arrangements satisfactory to said officers as therein provided; and, to take such possession, control, and direction of the development of the water power originally contemplated by said Acts, and to dispose of the same, in such way as they may deem advisable and proper, for the interest of the State—the said time limited in said Act having expired, to declare, in accordance with the provisions of Section 1 of the same, that the right, title and interest of the State to the said Columbia Canal, its appurtenances and the lands held therewith, so transferred by virtue of said Acts, have been forfeited and reverted to the State; and we, representing the State of South Carolina, having accorded to you, who have heretofore and do now claim possession of said Columbia Canal, and, after due notice given to you to make satisfactory arrangements as may be approved by the undersigned as officers of the State, and satisfactory to them, and having failed to do so, do make demand upon you for the possession, control of said property therein specifically set forth and described and do hereby give you notice that they will, upon the 20th day of August, A. D. 1917, at twelve o'clock noon, make re-entry upon and in behalf of the State and take possession and control of said property; and that you, your agents and servants, from now on cease to take or have any management or control of said property, and do surrender the possession of same peacefully and in a proper manner to the said undersigned, chargeable by the said Act with the possession, management, control and direction, and development of the
254 water power, and for carrying out the completion of the canal for navigable purposes, as contemplated by the aforesaid Acts and dispose of the same in such way as they may deem advisable and proper for the interest of the State.

And you are further notified that any attempt upon your part your officers, agents and employees, to interfere with, impede, obstruct the possession, control and management of said property as authorized by provisions of the Act approved March 12, 1917, or in any manner trespass upon said property after the re-entry made by

as mentioned in this notice, shall be considered and treated as a trespass.

To this notice of re-entry we have hereunto affixed our signatures as officers of the State of South Carolina as members of said committee, this tenth day of August, A. D. 1917.

L. Letter of August 4, 1917, from defendant to members of Commission:

DEAR SIRS:

The Columbia Railway, Gas & Electric Company, by its attorneys thereunto duly authorized, acknowledges your letter of August 10th, and respectfully advises you that it denies in toto your claims concerning the Columbia Canal.

The company further warns and notifies each of you to refrain from interfering with or trespassing upon its possession, management or control of the Columbia Canal, and its appurtenances, and notifies you that it will hold each of you personally and individually responsible for any interference with or trespass committed upon its property or possession.

The company further advises you that said Act of 1917, to which you refer and under which you claim authority, is null and void because it violates the Constitutions of the United States and of South Carolina.

255 M. Letter of August 20, 1917, from Commission to defendant:

GENTLEMEN:

We acknowledge receipt of your letter of date the 14th instant.

In pursuance of our notification to you, of date the 10th instant, and in view of your reply thereto, of the 14th instant, we hereby notify you that the Commission appointed by the State of South Carolina claims possession and control of the property described in said Act and in said letter to you; and for and in behalf of the State of South Carolina claims possession and control of said property from and after twelve (12) o'clock noon of the present day, and that the re-entry mentioned in paragraph 2 of said Act has, by reason of the notice heretofore served upon you and of your reply thereto, have performed the direction of said Act in such way as is proper under the circumstances. Therefore, the State of South Carolina, by and through us, in its behalf, claims the possession and control of said property, its development and disposal in accordance with the terms and provisions of said Act

N. Letter of September 16, 1919, from defendant to Commission:

GENTLEMEN:

The decision recently rendered by the Supreme Court of South Carolina, in the case of State of South Carolina v. Columbia Railway,

Gas and Electric Company, is the first adjudication that this company is obligated to complete the Columbia Canal down to Congaree River, a few yards above the mouth of Rocky Branch.

This company hereby offers to complete the Columbia Canal down to Congaree River, a few yards above the mouth of Rocky Branch, and to construct and maintain the same in accordance with
256 the Act of December 24, 1887, and Acts amendatory thereof, under which the grant of the canal to this company was made, and will begin work thereon upon notice from you that this offer is accepted, and carry the same through without delay.

It is, of course, understood that upon acceptance of this offer all pending litigation shall be abated or suspended pending such completion, and upon completion this company is to be properly relieved from any claim of forfeiture by the State of South Carolina.

O. Letter of October 11, 1919, from Commission to defendant

DEAR SIRS:

Pursuant to my letter of the 19th ult., I submitted to the Commission your letter of the 16th of September, and your proposal therein embodied had the careful consideration of its members. I am now directed by the Commission to say this in reply:

After careful examination of the Act of 1917, the Commission find no authority given them to enter into or conclude any agreement with your company with regard to the completion of the canal or to suspend the action now pending to enforce forfeiture declared by the Act of March 12, 1917, and to recover the possession of the canal property nor to suspend any action for damages against the present claimants or owners of the property as authorized by the said Act. On the contrary, it looks to a prompt prosecution and termination of the proceedings already instituted or the one to be instituted for damages. The Act of 1917 specifically provided the time in which the Attorney General and other members of the Commission therein mentioned were permitted to "make such arrangements or agreements with the parties claiming to have any right, title or interest in the premises as they deemed advisable and proper to pro-
257 tect the interest of the State, the same, however, to be made within 90 days from the approval of this Act and report the same to the General Assembly for its approval at its next regular session."

We have noted the allegations contained in your answer to the complaint made by the State to the effect that the Columbia Railway, Gas & Electric Company made every reasonable effort to make satisfactory arrangements with the Commission with regard to said canal, which the Commission did not accept, but that your offers were refused without explanation or disclosing any terms or propositions that it would consider satisfactory. Your propositions were in effect that the State should do the work of completion of the canal as is contemplated by the Act of 1887, and as amended in 1890, from its present terminus just north of Gervais street to or near Rocky Branch, and then upon the completion of such work the State

was to turn over to the company the entire canal, you paying the State, by your first proposition, $50,000, and by the second $75,000. The propositions were not entertained by the Commission as you well know because of their utter inadequacy, and because of their being so incompatible with the duty of the Commission to protect and preserve the interests of the State. The Commission considered that such propositions were really not intended to reach any satisfactory arrangements. The State would not consider doing the work which the company had assumed and obligated itself to do and hazard the risk of having to pay thousands of dollars in excess of the amount the company stipulated. The company declined to make any proposition to carry out its obligation or to give any guarantee to safeguard the continued maintenance of the canal as a navigable passway between the two rivers. The record of the proceedings had, will show that no effort whatever was made or suggested by
258 the company to carry on the work at all. It was simply attempting to hire the State to do the work for an insignificant consideration.

We further note that the company, in its answer, alleges that the State of South Carolina has never made any demand upon the company to extend the canal.

After a lapse of more than 14 years, during which the company has been in possession under conveyance wherein it assumed specific obligations the Commission is surprised at such a statement. The company has been fully apprised as to its duties as can be readily learned from the legislative records. Moreover, the company has always acknowledged the binding effect of the requirement of the Act of 1887, and never denied this obligation until after the passage of the Act of March 12, 1917. Legislative committees have repeatedly recommended the continuance of Acts and Joint Resolutions of the General Assembly at the company's request, permitting and allowing it to make such offers as it desired to make which would relieve it from the absolute duty of wholly completing the canal or to allow it to present some plan which would be satisfactory to the Legislature to be worked out in connection with the Federal improvement of the Congaree River.

It is quite true that no Court has made any adjudication or passed any judgment upon the construction of the Act of 1887, but the question of your obligation needed no judicial interpretation whether, as contended by the company's counsel, it was a covenant or a condition. In either event, the obligation to perform was clearly defined by the Act. The Commission, however, will not go into further detail or comment upon these matters, being content to await the judgment of the Court and jury upon the facts in the trial of the case on its merits.

However, this Commission, desirous of ending the dispute about the canal, and at the same time desirous of protecting in every
259 respect the rights and interests of the State and her citizens and to obtain the completion of the canal for use as a navigable channel between the two rivers, will now make to your company

some suggestions, which they deem essential to be embodied in any tentative proposition the company may make if it so disposed and which the Commission could ask the Legislature to approve.

In the meantime, in view of the time consumed since the passage of said Act of March 12, 1917, by reason of the preliminary objections the company has raised, it must now be understood that the Commission will proceed with the preparation of the case now pending for trial or any other case which is authorized by the Act of 1917, notwithstanding. If these suggestions are accepted the trial upon its merits would, as a matter of course, have to be suspended until the proposition is submitted to the next regular session of the General Assembly. To obviate any misunderstanding upon the subject, however, the company must agree that neither it nor its officers or agents will interfere with the right of the State to have surveys made of all the property and its conditions and all estimates of the cost of the completion of the canal so that in the event there be a failure of making an agreement the State will not have been seriously delayed.

These conditions and stipulations which are here suggested should we reach a conclusion are to be embodied in a formal agreement executed in duplicate by the Columbia Railway, Gas & Electric Company and the Commission, subject to the approval of the General Assembly at its next session.

1. The completion of the canal by the company as contemplated by the Acts of 1887 and as amended in 1890 should be made within two years from the approval of this agreement by the General
260 Assembly, or if in the work it should be found that it will be more beneficial to the State and to the State's interest and navigation can be better obtained by making any change from the manner and dimensions set out in the statutes upon any suggestion by the Federal authorities controlling navigation of the Santee and Conagree rivers and in facilitating such navigation by means of the canal, such change or changes shall be made, but only after the approval of the Commission or its authorized agents for that purpose, such changes are to be submitted in writing to it for such approval, and if necessary the company shall widen and enlarge the dimensions of the locks at the beginning and exit of the canal to meet the requirements of modern river navigation, but to be not less than the dimensions of 22 feet in width, ten feet in length and six feet in depth.

2. The work shall be subject to the supervision of the Commission or by its duly appointed engineer, and must be approved in writing by them both as to construction and material and as to its meeting the requirements of the Act or as it has been changed by Federal suggestion or authority.

3. The company shall repair the canal and necessary accessories above Gervais street, and said company is to continue to keep the canal throughout its entire length in good condition for boats to pass and repass free of charge, as prescribed in the Act of 1887, and Acts amendatory thereof.

4. That a bond approved as to surety by the Commission and as to legal form by the Attorney General and associate counsel in the sum of $200,000, to be given to the Commission by Columbia Railway, Gas and Electric Company, for the due performance on the part of the company to complete and keep in repair and in proper condition the canal as herein stipulated and agreed upon and to remain in force — years, after the canal has been so extended, completed and repaired throughout its entire length, but upon
261 failure to perform any of the conditions, obligations and stipulations herein above set forth the State or the Commission or any other authority of the State having control thereof shall declare this agreement to be at an end. It is also to be agreed between the parties to the agreement that this sum of money shall be considered as liquidated damages for such failure upon the part of the Columbia Railway, Gas and Electric Company, and in such event the Commission shall proceed to collect the same as such liquidated damages.

5. The Columbia Railway, Gas and Electric Company shall, upon the present case now pending or any to be brought, being by order duly entered suspended, as herein agreed upon, pay to the Commission the aggregate amount of the appropriation made by the General Assembly for the years 1917, 1918 and 1919, and if such further appropriation for the year 1920 as it may become necessary to make in connection with the proceedings to recover the property as directed in the Act of March 12, 1917, and the costs and disbursements authorized by the Commission. The company shall also pay 15 days after the approval of the General Assembly of this agreement all the amount of rentals received from the Columbia Mills Company or its successors or assigns for water power used by the said mills under its contract with the Columbia Water Company from March 12, 1917, to the first day of January, 1920, and also for all of the net income from rentals of current from the power station on the canal received from the said Columbia Mills Company, its successors and assigns, or from any corporations or persons under contract or lease with the Columbia Water Power Company, which were assigned by said company to the Columbia Railway, Gas and Electric Company for and during said time; also the net income received
262 from any corporation or person for current supplied by the canal power station under any contract after March 12, 1917. These payments are to be made because the Columbia Mills Company owned its own power station and took water from the canal, and the conveyance to the Columbia Water Power Company, the grantor of the Columbia Railway, Gas and Electric Company, did not cover that part of the canal occupied by the power station of the Columbia Mills Company. The other payments are to be made because the Columbia Railway, Gas and Electric Company were trespassers with notice and their actions were wilful and in defiance of the Acts of the General Assembly, and, therefore, they should respond certainly to the extent of the net income received. Besides which the State has paid large rentals itself for the lighting of its own buildings, etc., which otherwise it would not have done having

under its control and management a power station adequate to supply all the power that could be developed by the canal in its present condition, if properly kept in proper condition.

6. The Columbia Railway, Gas and Electric Company is by said agreement to fully recognize and acknowledge the right, title and interest of the State in and to the canal property and its right to declare a forfeiture and to make re-entry upon the property, and the reversion thereof to the State as described in its complaint in the action pending, and that should the company fail or refuse to carry out this agreement, no action will be necessary to declare a forfeiture, to make re-entry or for any further question to be made as to its title and right of possession brought in issue between the parties to the agreement or the successor or assigns of said company. Upon failure or refusal to carry out this agreement in any of the particulars heretofore mentioned and which are made as express conditions upon which and the consideration of which moves
263 this Commission on behalf of the State to enter into any agreement, the company shall surrender the actual possession of said property to the State, and its duly appointed agents clear of encumbrances, without reservation and without hindrance whatsoever.

7. For and in consideration of the performance of the above agreements on its part by the Columbia Railway, Gas and Electric Company, its successors or assigns, the State of South Carolina will suspend all proceedings now pending or to be commenced under said Acts, and permit and allow the defendant company to proceed with its work contemplated by this agreement and the Acts of 1887 and 1890, without further let or hindrance, and within 60 days after the approval of the General Assembly and finish the completion of the same within two years from beginning said work, and that a consent order shall be entered in said case or cases carrying out this agreement as to the suspension of said proceedings so that a proper record shall be made and preserved in said case. The Columbia Railway, Gas and Electric Company, in consideration of the suspension of the present case and bringing of another action for damages mentioned in the Act of 1916 against it, hereby agrees to waive the statute of limitations in case any action or actions should be proceeded with in the event of the necessity of resuming said action or actions against such company.

8. The company will, in the event of the approval of this agreement by the General Assembly, pay off the $200,000 in bonds issued by the Board of Trustees under the authority of the Act of 1887, and have the mortgage securing them duly canceled within 20 days after such approval. These bonds were issued by the Board of Trustees of the Columbia Canal and were made expressly subject to the performance of all the conditions, limitations, fran-
264 chises and exceptions set forth and prescribed in the Act of the General Assembly of 1887. The principal of said bonds has now become due and payable. The Columbia Railway, Gas

and Electric Company, in the conveyance of the canal to it by the Columbia Water Power Company, expressly assumes the payment of the principal and interest of said bonds. It is, therefore, nothing but a matter of right that the State should now demand that this assumption shall be carried out and the mortgage upon the proper-y canceled so that no question of confusion will arise with regard to it.

9. In view of the fact that on the 1st day of July, 1905, the Columbia Electric Street Railway, Light and Power Company, the predecessor in name of the Columbia Railway, Gas and Electric Company, did convey by way of mortgage or by indenture to the Mercantile Trust and Deposit Company, of Baltimore, all the water power plant, property, water rights, easements and franchises which were required by the said railway company from the water power company, under deed of the same date and recorded in the Register of Mesne Conveyance office of Richland county to secure an issue of bonds of $2,000,000, and the said mortgage securing the said bonds and the property conveyed to it and which was formerly canal property without the consent of the State or its acquiescence therein, and the same should now be canceled if the said bonds are still outstanding to the extent of the canal property, and if they have been taken up by an issue of new bonds, then that such record undoubtedly be canceled, and a discharge therefrom be duly and properly made of record. And inasmuch as on the 1st day of July, 1911, the Columbia Railway, Gas and Electric Company, without the knowledge, consent or acquiescence of the State of South Carolina, did execute to the Knickerbocker Trust
265 Company, a corporation of New York, a mortgage or deed of trust, wherein is included the identical property and water power plant and franchises, etc., which were conveyed to the company or its predecessor, the Columbia Water Power Company, to secure an issue of $7,500,000, and that the said mortgage is of record, the railway company shall, within 15 days from the approval of this Act, have such property released and discharged from the lien of such mortgage or from any obligation to respond for the payment of any of the said bonds, except in so far as the proceeds of said bonds shall have been used or are to be used for the maintenance or improvement of the canal in pursuance of the conditions imposed under the Act of 1887 and Acts amendatory thereof.

10. And inasmuch as on the first day of August, 1912, the Parr Shoals Power Company did issue a series of bonds amounting to $3,000,000, which were secured by a first mortgage and deed of trust to the Columbia-Knickerbocker Trust Company, and the defendant company did, without the knowledge or acquiescence of the State, its agents or officials, guarantee the payment of the principal and the interest of the said bonds as the same became due, as well as the sinking fund payments at their maturity, it is requested that you cause the Parr Shoals Company and the said trustee to have said guarantee modified so as to discharge the canal property as conveyed by the Board of Directors of the Penitentiary to the

Board of Trustees of the Columbia Canal, and all structures and improvements incident or appurtenant to the uses of said canal as declared under the Acts aforesaid.

All these liens and attempted liabilities attaching to or involving said canal property shall be canceled and the record thereof so made at the times hereinbefore mentioned, the proceeds thereof
266 having been used exclusively for the benefit of the Parr Shoals plant in which the State of South Carolina is not interested directly or indirectly.

It is understood that the Commission does not, by virtue of making these suggestions, presume to acknowledge in any respect the validity of any existing operating agreement between the Columbia Railway, Gas and Electric Company and the Parr Shoals Company.

11. That the Columbia Railway, Gas and Electric Company, the defendant, will pay to the State of South Carolina in consideration of the foregoing such an amount as may be determined upon by the Commission and said company as the result of conference as damages insuring to the State by virtue of said company's acts and derelictions in the particulars to be set out in such action or actions as further contemplated by the Act of 1917.

12. The Commission and the company agree that at any hearing to be had before any committee of the General Assembly, to which any measure pertaining to the subject matter herein may be referred, they will exercise such influence as they command toward a favorable report or such measure as may authorize the concluding between the Commission and the company such an arrangement as is herein suggested.

In the event the next regular session of the General Assembly, for any cause whatsoever, fails or neglects to consider or take action upon any proposal in pursuance of this letter which may be recommended and submitted to that body, the company and the Commission are to understand that the matter of negotiating an agreement shall be at an end, and the Canal Commission will immediately thereafter resume the prosecution of the pending case and of such other cases or actions provided for or contemplated by the Act of 1917.

267 P. Letter of November 6, 1919, from defendant to Commission:

DEAR SIR-:

As soon as your letter, dated the 11th day of October, 1919, was received, containing the counter proposals of the Canal Commission concerning the proposition made by this company that it would complete the Columbia Canal in accordance with the Acts of 1887 and 1890, as president of Columbia Railway, Gas and Electric Company, I called a meeting of the Board of Directors and they were convened as expeditiously as possible. The meeting took place on

the third day of November, and I am authorized by the Board of Directors to make to the Canal Commission the reply contained in this letter.

Columbia Railway, Gas and Electric Company repeats its offer to complete the Columbia Canal in accordance with the Acts of 1887 and 1890, and further agrees to your suggestion that the work should be completed within two years, subject, however, to strikes, the action of the Courts or other unavoidable delays.

This company will pay off and cancel the $200,000 of what are known as Canal Bonds, issued by the Board of Trustees of the Columbia Canal under the deed of trust dated the first day of February, 1888, and will have the mortgage made by said Board of Trustees cancelled of record.

This company will keep the Columbia Canal in a state of good repair, and makes this agreement very readily since the canal is now in a good state of repair and it is the intention of the company to so keep it.

A bond in the sum of $200,000 will be given by this company in the usual form furnished by contractors, the sureties to be sufficient to complete the canal to the Congaree River as provided in
268 the Acts of 1887 and 1890, and within the time hereinbefore stated. Furthermore, it agrees that the engineers of your Commission shall make the survey desired by your Commission; in fact, the consent of the company to these surveys has already been communicated to your Commission, and if the newspaper reports are to be credited the survey has been commenced.

In the work of extending the canal this company will concede to the Commission all proper methods of supervision and inspection, and will facilitate the work of the representative of the Commission in this respect.

In the work of extending the canal this company will agree to carry out any changes from the specifications set out in the Acts of 1887 and 1890, provided such changes will not increase the cost to this company, nor extend the duration of the work, and will acquiesce in any other changes that the State may desire to make and for which the State will make payment, if any such are desired. The language used in the proposition No. 1 in your letter is so vague and is capable of so many interpretations that we are unable to make a definite reply thereto; but it apparently required the company to consent to extend the canal to any point decided upon by your Commission. To this the company cannot agree since its obligations are those fixed by the Acts of 1887 and 1890, but it does definitely agree as stated in its letter of September 16 to your Commission, to "complete the canal down to Congaree River a few yards above the mouth of Rocky Branch." This is the obligation which the Supreme Court said it assumed under the Acts of 1887 and 1890. The dimensions of the locks set forth in your letter seem to be the result of a typographical error.

This company will keep the canal open for navigation in so far as it legally can. In fact, the Supreme Court of this State has

long since decided that the city of Columbia must remove
269 the bridge, which the city built to support the pipes of the city waterworks across the canal. Why this order of the Supreme Court has not been carried into effect we are unable to say.

And in order that there may be no misunderstanding it is well to state that this company offers to carry out all the requirements of the Acts of 1887 and 1890, whether set forth in this correspondence or not.

With reference to your propositions Nos. 5 and 11, which would require the company to pay to the State the amount of the appropriations made for the Commission, and also certain revenues received from the canal, and also damages, the company can not make such an agreement. The company offered to complete the canal immediately upon the adjudication by the Supreme Court that it was its duty to do so, and this will be a full discharge of its duty in the premises, and it can see no ground upon which it should be expected to pay damages. It, therefore, declines to do so.

With reference to the requirements of your proposition No. 6, that this company shall admit the title of the State and agree that a failure to perform any particular of this agreement will work a forfeiture, the company cannot do so. This would concede the very issue involved in the present litigation and is not at all necessary to secure the bona fide performance of the company's offer to complete the canal. The bond for $200,000 will fully protect the State.

In answer to your proposition No. 7, in case an agreement is reached in other phases of this matter, the company will enter into the proper stipulation to the effect that the State of South Carolina shall not be prejudiced by such agreement.

Regarding your ninth proposal, it seems your Commission has overlooked the fact that the deed of trust to Mercantile Trust and
Deposit Company, of Baltimore, referred to by you, is no
270 longer a lien on any property of this company, since the mortgage has long since been satisfied. See Book of Mortgages 40, page 306, in the office of the Clerk of Court.

Your propositions Nos. 9 and 10, that this company secure a release of the canal property from the mortgage of the Knickerbocker Trust Company of 1911, and the Parr Shoals guaranty, are entirely and apparently impossible. If the canal be completed under this agreement it remains the property of this company subject only to the performance of certain duties, and the existence of the mortgage and guaranty in no wise affects the rights of the State to enforce performance of these duties.

Your letter places a wrong interpretation on the letter of this company dated April 25, 1917, to your Commission, in an effort to compromise this matter during the 90 days stipulated by the Act of 1917. The company offered to pay to the State $50,000 (later increased to $75,000) to be released of all obligations to extend the canal. The offer did not impose any obligation on the State to extend the canal if the money was accepted, but stated that in case the State should extend the canal the extension should belong to

this company as a part of the canal. The citizens favoring the Act of 1917, creating your Commission, stated before the Committee of the Legislature that the canal could be completed for $75,000, which is the reason that sum was offered. This company has always believed, and still believes, that the completion of the canal would be of no benefit to the State or the general public, and, thinking that if the Commission would investigate the facts impartially, they would arrive at the same conclusion, made the offer of payment in money which could be used for State purposes instead of spending the money upon a project of no value to the State or its citizens.

271 Your letter is the first intimation this company has had of the reason for the rejection of its offer. The record of the meeting of your Commission, at which this proposition was discussed, contained in the printed report of your Commission to the General Assembly, shows that the attorneys for this company repeatedly asked the Commission to state the reason for the rejection of its offer or to suggest any offer that the Commission would accept, and shows that the Commission would give no answer whatever to either question.

Without in any manner endeavoring to discuss the legal aspects of the case in a letter to your Commission, we will simply say that the Act of 1887 states that the canal shall be extended "as soon as is practicable," which is certainly indefinite as to time as well as circumstances, and that no demand by the State has ever been made that the canal should be extended. On the contrary, this company purchased the canal from the Columbia Water Power Company, which had held it for 13 years, during which time the State had made no demand for completion, and had never intimated that completion was expected. For the past 14 years this company has been in possession, so that for 27 years the canal has been in its present uncompleted status, and had the State desired its extension it could by a resolution of the General Assembly have so declared; no such resolution had been adopted.

In consequence of the decision of the Supreme Court we wrote you offering to complete the canal; in this letter we have offered every security that is reasonable to insure completion, and believe that the Commission will be so convinced.

272 Q. Letter of November 27, 1919, from Defendant to Commission:

DEAR SIR:

Your letter of November 20th was duly received.

Further consideration of the matter has led this company to the conclusion that the Commission is reasonable in its demand that the company should reimburse the State in the amounts expended by this Canal Commission. It, therefore, offers to reimburse the State in the amounts appropriated for and expended by the Commission during the years 1917, 1918 and 1919: Provided, The total

amount so to be paid does not exceed $16,000, and the company will make such payment within sixty days after the approval of the ratifying Act. The company also realizes that the Commission will be put in some expense in supervising the construction of the canal under any agreement that may be reached, and it will reimburse the State in such expenses in the future to the extent of $5,000.

R. Report of Alfred Wallace:

"*Report of the Condition of the Columbia Canal by Alfred Wallace.*

"Columbia, S. C., November 27, 1917.

The Dam.

"The dam across Broad River, at the head of the Columbia Canal, is a crib dam made up of ten by ten timber, in sixteen-foot squares, filled in with rock and floored with six by six by eight timber. The flooring in five places is gone; three other places, one plank each, and the other two places three or four planks. The dam in several places is out of line. The timber in the dam is well preserved. Seven cribs went out of this dam in the freshet of 1916.

273 The Locks.

"The locks are of granite construction, with four gates. There is a boat-way around the locks, leading into the river, which is stopped up with an old flat boat. This completely blocks this opening. The lockhouse is a frame structure, with metal roof and sides. The metal has rusted out, leaving holes in the roof and sides of the building, exposing the gate timber and iron to the weather.

The Canal Bank.

"On the west side of the canal bank, near one of the piers of the C., N. & L. trestle, there is a hole in the bank two feet wide, four feet long. The riprap on the bank from this point up the canal bank is washed up in places, and in several places the bank has settled. The new bank that was put in after the 1915 freshet is being washed by rains. This bank has also settled in places.

"There are two bridges across the canal, one at the Duck Mill and one at the city waterworks. The city gets its power from its pumping station on the canal. The city has a steam plant operated on the east side of the canal bank. The bridge over the wasteway, near the city waterworks, is in bad condition. The first power house that was put in on the canal was in the rear of the Penitentiary. This power site was owned by the State and was leased to the Street Railway Company from the State when J. Q. Marshall was president of the company. The Street Railway Company pays monthly bills for the use of this power. This plant has been dismantled by the present owners of the Street Railway Company. The Duck Mill gets

its power from the canal and also power from the Street Railway Company. The Duck Mill's plant is operated by themselves, and is of 1,800 horse power, for which they pay the Street Rail-
271 way Company $6 per month for horse power. The Columbia Railway, Gas and Electric Company has a pumping station near the Duck Mill, from which they use water from the canal for their steam plant. The water in the canal from the Duck Mill power plant to Gervais street is very quiet, causing a deposit of mud in the canal in front of the Street Railway power plant. The tail race of the Street Railway power plant is being filled up with mud and sand.

Distribution of Power.

"Power is distributed from this plant, and from the other plants of the Street Railway Company to the city of Columbia, the electric railway, five cotton mills, four phosphate mills, three cotton seed oil mills, the State buildings and Camp Jackson.

"The Street Railway Company has made a new contract with the city of Columbia for furnishing power. The City Treasurer, Mr. Cooper, could not show me this contract because the contract had been sent to the Street Railway Company to be signed, and has not yet been returned. They pay more for use of the power under this contract than they did under their old contract.

"Since 1914 the power in Columbia and vicinity has increased very much. The power plant of the Olympia Mills has been taken over; the Swift plant has increased its plant considerable; the Palmetto Cotton Mills, the Carolina Veneer Company, a new concern, takes considerable power. All of the cotton seed oil mills have increased their plants, four stone cutting sheds have been established since 1914.

"In October of 1916, the city of Columbia paid the Street Railway Company $2,325 for power. In October, 1917, they paid $2,448.

"There are seventeen towers on the canal banks, from the
275 city limits down to Gervais street, that carry the power from Parr Shoals, but I believe that line is owned by the Street Railway Company from the city limits."

Exhibits 9 and 10.

These are included in Exhibit 8.

Exhibit 11.

Blue prints of canal, etc., made by Ludlow. Omitted.

Exhibits 12, 13, 14, and 15.

Four reports of N. E. Derrick, certified public accountant, to Canal Commission. Omitted.

EXHIBIT 16.

Mortgage from Columbia Electric Street Railway, Light and Power Company to Mercantile Trust and Deposit Company of Baltimore, Trustee, dated July 1, 1905.

This, among other provisions, contained the following:

"Whereas, It is deemed expedient that this company shall borrow money, for the purpose of retiring its floating debt and outstanding bonds, for the purpose of acquiring certain property and franchises from the Columbia Water Power Company, and for the purpose of constructing a new power station and for other betterments and improvements of the company's property, and for other corporate purposes.

"Resolved, That the Columbia Electric Street Railway, Light and Power Company shall make and execute bonds, payable to the Mercantile Trust and Deposit Company, of Baltimore, trustee, or
276 bearer, if not registered, or to the registered owner, if registered, to the aggregate amount of two million dollars * * *."

The above referred to indenture, which was in the nature of a mortgage, given to secure the above bonds, among other property covers the following:

"Water power plant and franchises:

Also all the water power plant, property, water rights, easements and franchises which were acquired by the said railway company from the Columbia Water Power Company, under deed of even date herewith, and intended to be recorded prior hereto among the land and chattel records of Richland county, in the State of South Carolina, to the said railway company from the said Columbia Water Power Company (exclusive of that part of the land so acquired, which is hereafter expressly exempted from the lien, legal operation and effect of this indenture), including in the said property and franchises the following:

All the real and personal property formerly owned by the said The Columbia Water Power Company in the city of Columbia and in Richland county, in the State of South Carolina, or elsewhere, including its dam, canal, rights of way, water rights, easements, power station, turbines, dynamos, motors, machinery, wires, poles, lines, lamps, conduits, subway and overhead structures and pole and transmission lines, together with all the other rights, privileges, easements, appurtenances and franchises, formerly owned by the said The Columbia Water Power Company, and granted, assigned, transferred and set over by the said The Columbia Water Power Company to the said railway company under the aforesaid deed of even date herewith, subject to the terms, covenants, reservations and conditions contained in said deed to the said railway company from the said The Columbia Water Power Company * * *."

277 EXHIBIT 17.

First mortgage and deed of trust of Columbia Railway, Gas and Electric Company to Knickerbocker Trust Company, trustee, dated July 1, 1911.

The mortgage recites:

"Whereas, The company desires to provide funds for the payment of its bonded and other indebtedness, the improvement and extension of its plant and properties, the acquisition of new properties, and for its other corporate purposes; and,

Whereas, The company has deemed it necessary to borrow money for the purposes above recited and to issue its bonds therefor, and to mortgage its property, hereinafter described, to secure the payment of the same, and to that end at meetings respectively of its stockholders and directors duly called and held, has duly resolved and determined to issue the bonds of the company to be known as the First Mortgage Five Per Cent Sinking Fund Gold Bond of the Company (hereinafter called the first mortgage bonds), limited to the principal sum of seven million five hundred thousand dollars ($7,500,000), to be dated on the 1st day of July, 1911, to be payable on the first day of July, 1936, * * *."

The mortgage securing the payment of the above mentioned bonds and interest, among other properties of the defendant, covers all of the real and personal property formerly owned by the said Columbia Water Power Company in the city of Columbia, Richland county, or elsewhere, including its dam, canal, right of way, water rights, easements, turbines, dynamos, machinery, wires, poles, etc., granted by the said Water Power Company to the defendant by deed dated July 1, 1905.

278 EXHIBIT 18.

First mortgage and deed of trust of Parr Shoals Power Company to Columbia-Knickerbocker Trust Company, trustee, dated August 1, 1912.

Under the above mortgage the Parr Shoals Power Company secured the issue of bonds to be known as its First Mortgage Five Per Cent Sinking Fund Gold Bonds, $3,000,000 in principal amount to be dated August 1, 1912, and payable April 1, 1952, interest from August 1, 1912, at the rate of five per cent per annum, payable semiannually. The mortgage covers the property of the Parr Shoals Company, in Fairfield, Lexington and Newberry counties.

After prescribing the form of the bonds to be issued, said mortgage provides as follows: "And, whereas, Columbia Railway, Gas and Electric Company, a corporation of the State of South Carolina, is to endorse upon each of said bonds a guaranty of the payment of the principal and interest thereof, as the same mature, and also as they become due, the sinking fund payment provided for in this

indenture, such guaranty to be in substantially the form following, viz.:

"For value received, Columbia Railway, Gas and Electric Company hereby guarantees the payment of the principal and interest of the within bond, as the same mature, and also, as they become due, the sinking fund payments provided for in the first mortgage securing said bond."

The said mortgage also covers, "All the right, title and interest of the company in and to the agreement between the company, South Carolina Development Company, a corporation of the State of Maine, and Columbia Railway, Gas and Electric Company, a corporation of the State of South Carolina, dated August 1, 1912, providing for the operation, in perpetuity, upon conditions therein stated,
279 by said Columbia Railway, Gas and Electric Company, of the hydro-electric properties of the company, when developed."

Article Four of the Mortgage recites: "The company covenants that for the further security of said bonds it will pay to the Trustees as and for a sinking fund, on the 1st day of January and on the 1st day of July of each of the years 1918 to 1951, both inclusive, and on the 1st day of January, 1952, a sum equivalent to one-half of one per centum of the aggregate face amount of the first mortgage bonds issued to the time of such payment, whether outstanding or not; provided, however, that the company shall have the right to increase the sinking fund payment in any half year (which right shall not reduce the sinking fund payment in any subsequent half year), and also the right instead of paying cash, to turn in first mortgage bonds at the face amount thereof and accrued interest."

Exhibit 19.

Operating agreement between Parr Shoals Power Company and Columbia Railway, Gas and Electric Company, dated August 1, 1912.

Agreement dated the 1st day of August, 1912, made by and between The Parr Shoals Power Company, a corporation of the State of South Carolina (hereinafter called the "Power Company"), party of the first part, and Columbia Railway, Gas & Electric Company, a corporation of the State of South Carolina (hereinafter called the "Columbia Company"), party of the second part:

South Carolina Development Company, a corporation of the State of Maine, by an agreement with the parties hereto, dated August 1, 1912, executed simultaneously herewith, has undertaken (1) to de-
velop the hydro-electric properties owned by the Power Com-
280 pany on the Broad River, at or near Parr Shoals, South Carolina, in the counties of Lexington, Newberry and Fairfield, and described in the Power mortgage hereinafter defined, or to cause the same to be developed, by the construction and equipment, for the Power Company, of a dam and a complete hydro-electric power plant (including a transmission line from the plant

to a point in or near Columbia, and a sub-station at such point) of an initial capacity of about 18,000 horse power, with space for additional units of about 6,000 horse power capacity, all in accordance with certain plans and specifications described in said agreement and approved by the parties hereto, and (2) to deliver the same to the Power Company, complete and ready for operation, on or before July 1, 1914. Said dam, plant and all property and rights acquired in connection therewith are hereinafter called the "Power development."

The Columbia Company owns and operates street railways and electric light and power plants in Columbia, South Carolina, and vicinity, and requires, for the present and prospective needs of its business, a large and permanent supply of additional power, which it is authorized and desires to secure by the operation of the Power development upon the terms of this agreement.

The execution of this agreement has been duly and legally authorized by the directors and the stockholders of each of the parties.

Wherefore, the parties hereto agree as follows:

First. Upon the completion of the Power development as aforesaid and the delivery thereof to the Power Company, the Power Company shall deliver the same to the Columbia Company for operation under this agreement, and the Columbia Company shall accept delivery thereof and shall operate the same (and all extensions thereof and additions thereto) for the Power Company in perpetuity,
281 or until this agreement be terminated as provided in Article XII hereof.

The Columbia Company shall operate the Power development to as nearly full capacity as available business shall permit, and shall use its best efforts to promote the business thereof and to realize the largest surplus earnings therefrom consistent with the proper maintenance thereof.

All earnings, income and profits derived from the Power development (and all extensions thereof and additions thereto) shall be applied, so far as necessary, to the payments specified in Article III of this agreement, and any surplus after making such payments, but not before, shall belong to the Columbia Company absolutely. Such earnings, income and profits (except such surplus) shall be kept separate from those of the Columbia Company, which shall maintain, with respect thereto, separate and complete accounts.

Second. Upon the delivery of the Power development to the Columbia Company for operation hereunder, as above provided, the total outstanding capital stock, bonds and indebtedness of the Power Company shall not exceed the following:

Seven Per Cent Preferred Stock, cumulative after January 1, 1914	$300,000
Common stock	2,000,000
First Mortgage Five Per Cent Sinking Fund Gold Bonds (hereinafter called the "Power Bonds"), dated August 1, 1912, maturing April 1, 1952, out of a total authorized issue of $3,000,000, secured by the first mortgage of the Power Company to Columbia-Knickerbocker Trust Company as trustee, dated August 1, 1912 (hereinafter called the "Power mortgage")	2,700,000

except that not exceeding $300,000 of the Power bonds, in addition to said $2,700,000 thereof, may then be outstanding if the
282 Columbia Company shall previously have consented thereto in writing.

Upon the delivery of the Power development to the Columbia Company for operation hereunder, the Power development and all other property and rights of the Power Company shall be free from all liens and incumbrances, except the lien of the Power mortgage and any liens or incumbrances which, in the opinion of counsel of the Power Company, it is impracticable to discharge or remove and which are unsubstantial in nature or which existed upon parcels of land or rights when acquired.

So long as no default specified in Article XII hereof shall exist, the Power Company shall not, without the written consent of the Columbia Company, create or issue any stock or bonds or other indebtedness in addition to the stock and bonds in this Article II above specified, or create any lien upon the Power development or any other property or rights of the Power Company, whether now owned or hereafter acquired by it.

Third. The Columbia Company, so long as it shall remain in possession of the Power development, shall pay:

(*a*) All expenses of operating the Power development, including adequate maintenance and ordinary replacements and renewals, insurance, claims for damage to person or property, and all other expenses not chargeable to capital account under the system of accounting customary with hydro-electric companies or under the regulations of any governmental authority having jurisdiction;

(*b*) All taxes, assessments and other governmental charges levied or imposed upon the property, franchises, earnings, income, privileges or business of the Power Company, as the same shall become due and payable; provided, however, that the Columbia Company shall have the right, in the name of the Power Company or otherwise, by appropriate legal proceedings to contest any such
283 tax, assessment or charge, and, pending such contest, to delay or defer the payment thereof;

(*c*) The interest, as the same matures, upon all lawful demands secured or represented by liens or incumbrances upon real estate o

interests therein, subject whereto any lands and rights of the Power Company shall have been acquired;

(*d*) The interest, as the same matures, upon all Power bonds that shall be issued and outstanding under the Power mortgage (including bonds held in the Sinking Fund provided for in said mortgage) and upon all bonds that shall be issued in renewal of or substitution for or to refund the same, and upon all other bonds or obligations hereafter issued by the Power Company with the consent of the Columbia Company pursuant to the provisions of this agreement;

(*e*) The Sinking Fund payments provided for in the Power mortgage, as they become due; provided, that the Columbia Company shall have the right to increase such Sinking Fund payment in any half-year, and the right, instead of paying cash, to turn in Power bonds at the face amount thereof and accrued interest, as provided in said mortgage.

(*f*) The interest, as the same matures, upon any indebtedness other than aforesaid that shall be incurred by the Power Company as permitted hereby.

(*g*) The amount of all proper expenses incurred by the Power Company for maintaining its corporate existence and organization, keeping its accounts, verifying the earnings and accounts of the Columbia Company in connection with the Power development, engineering services (including reasonable inspection of the Power development and work connected therewith), counsel fees, all fees in connection with the issuance of securities consistently with this agreement, and the other necessary expenses of the Power Company and the expense of any action taken by the Power Company at the request of the Columbia Company.

(*h*) Cumulative quarterly dividends, beginning April 1,
281 1914, at the rate of seven per cent per annum, upon all shares of preferred stock of the Power Company outstanding and not owned by the Columbia Company, such payments to be made April 1, July 1, October 1 and January 1 in each year, direct to the preferred stockholders of the Power Company, as the same shall appear to be of record at noon on the preceding March 15, June 15, September 15 and December 15, respectively, upon certified lists thereof from time to time to be furnished to the Columbia Company by the Power Company.

If at any time the income derived from the operation of the Power development shall be insufficient to provide for the payments to be made as in this Article III above provided, the Columbia Company shall nevertheless make said payments or cause the same to be made as so provided, and no liability upon the part of the Power Company to repay any amounts so paid shall arise from the making of any such payment.

The Power Company shall, from time to time, in accordance with the requests of the Columbia Company, ask the trustee under the

Power mortgage, when unexpended moneys shall remain in the sinking fund provided for therein, to call for offers of said bonds as permitted by Article IV of said mortgage.

Fourth. The Power Company shall, upon delivery of the Power development to the Columbia Company for operation hereunder, deliver to the Columbia Company all records and data of every nature relating to the Power Development (and all extensions thereof or additions thereto) and the construction, equipment and operation thereof, prepared, collected or owned by the Power Company or any of its engineers.

The Power Company shall preserve its corporate and other records, title papers, books and files, and shall permit the Columbia
285 Company to inspect the same at all reasonable times and to the fullest extent.

Fifth. The Columbia Company, for the Power Company, shall maintain and operate the Power development and all extensions thereof and additions thereto, in compliance with all provisions of law thereto applicable.

Reasonable wear and tear excepted, the Columbia Company shall maintain the Power development (and all extensions thereof or additions thereto) in as good condition and repair as the same shall be in when the Columbia Company shall begin operation of the same hereunder. Whenever any part thereof shall be destroyed or become unfit for use, the Columbia Company shall cause the same to be replaced, renewed or rebuilt, or to be replaced with property appropriate for use in the operation of the Power development of equal value, and such renewed, replaced or rebuilt property shall at once become the property of the Power Company and subject to the terms of this agreement, so that there shall be no depreciation of the Power development, or any part thereof, or of any extension of or addition to the same, except such as is necessarily incident to property of similar character properly maintained from time to time. The cost of all such replacements and renewals shall be supplied and borne as provided in Article III hereof.

The Columbia Company, for the Power Company, shall cause to be made or acquired such changes in and betterments, improvements and extensions of and additions to the Power development, if and when and as the Columbia Company shall determine the same to be for the best interests thereof, and particularly an enlargement of the capacity thereof from about 18,000 horse power to about 24,000 horse power, for which additional space has been allowed in said plans and specifications. Title to all such changes, betterments, improvements, extensions and additions shall be vested in
286 the Power Company and become subject to this agreement, and the Power Company shall co-operate with the Columbia Company in every way and to the fullest extent, to such ends.

The Columbia Company shall be entitled from time to time to demand and receive from the Power Company any of the Power bonds reserved under the Power mortgage and then unissued, necessary to enlarge the capacity of the power development, or to make better-

ments, improvements, extensions and additions contemplated by this agreement. Any Power bonds so received by the Columbia Company may be disposed of as it shall authorize, and their proceeds shall be used as aforesaid and accounted for upon demand of the Power Company.

Sixth. The Columbia Company, for the Power Company, shall keep the property connected with the Power development insured against loss by fire in the name of the Power Company in the manner and to the extent usual in such cases, the loss, if any, to be payable to the trustee under the Power mortgage, or to the Power Company, if the Power mortgage shall have been satisfied. The Columbia Company shall be entitled to have the proceeds of such insurance applied in such manner as it shall direct, subject to the provisions of the Power mortgage, and the Power Company shall cooperate with it in every way and to the fullest extent, to such end.

Seventh. The Columbia Company shall indemnify and hold harmless the Power Company and its promoters, officers, directors and stockholders against any and all liability by reason of accidents or injuries or damage that may occur at any time after the Columbia Company shall begin operation hereunder, growing out of the possession, operation, existence or condition of the Power development while under the control of the Columbia Company
287 (other than from any defect in title of the Power Company); and, upon notice, at its own expense shall defend any suit brought against the Power Company or its promoters, officers, directors or stockholders, or against or affecting the Power development, by reason of any such accidents or injuries or damage; and shall indemnify and hold harmless the Power Company, its promoters, officers, directors and stockholders, against any and all liability by reason of any causes of action, suits, proceedings, claims, damages and expenses on account of any future acts, omissions, defaults or obligations of the Power Company, done or incurred at the instance or request or for the benefit of the Columbia Company, or pursuant to any provision of this agreement while in force.

The Power Company shall indemnify and hold harmless the Columbia Company and its promoters, officers, directors and stockholders against any and all liability by reason of accidents or injuries that may occur at any time before the Columbia Company shall begin operation hereunder, and, upon notice of any suit to enforce any such liability, at its own expense shall defend any suit brought against the Columbia Company or its promoters, officers, directors or stockholders, or against the Power development by reason of any such accidents or injuries or damages therefrom.

Eighth. The Power Company shall be entitled at all reasonable times by its officers and engineers to enter upon and inspect the Power development.

The Power Company shall be entitled at all reasonable times, by its officers or other representatives, to examine all records and data kept by the Columbia Company relating to any property subject to

this agreement or to any business transacted by or through the operation of the Power development, and to obtain any information therefrom, and the Columbia Company shall co-operate with the Power Company in every way and to the fullest extent, to
288 such ends.

The Columbia Company shall from time to time furnish to or for the Power Company all reports and statements which the Power Company may be required by law to make or file or which the Power Company may require in order to perform any of its obligations hereunder.

Ninth. The Columbia Company, in respect of the Power development, shall faithfully observe and perform all the terms and conditions on the part of the Power Company contained in the Power mortgage, so that, in respect of such property, no default thereunder shall occur or arise on the part of the Power Company.

The Power Company shall forthwith notify the Columbia Company in writing of any default under the Power mortgage and of any other occurrence or proceeding whereby the rights of the Columbia Company or of the Power Company hereunder may be endangered.

Tenth. The Power Company shall maintain its corporate existence and organization and do all lawful acts requisite therefor. The Power Company shall, whenever required by the Columbia Company, do everything consistent with the rights of the Power Company under this agreement as shall, in the judgment of the Columbia Company, be necessary to or advisable for the due preservation and protection of the property subject to this agreement, and the performance of this agreement, and in default thereof the same may be done by the Columbia Company in the name and as the act of the Power Company. The Power Company shall from time to time hereafter make, do, execute, acknowledge and deliver, or cause to be made, done, executed, acknowledged and delivered all and such further acts, things, agreements, and assurances in the law for better effectuating and carrying out the provisions, objects and purposes of this agreement as may be requested by the Co-
289 lumbia Company. The Power Company shall not, without the written consent of the Columbia Company, consent to the appointment of any receiver of its properties, rights or franchises, or any part thereof.

Eleventh. The Columbia Company, for the Power Company, shall have the right at any time to dispose of any machinery, tools, implements and equipment forming part of the Power development which shall have become unserviceable or unnecessary for use, replacing the same by new machinery, tools, implements or equipment of equal value, which shall forthwith become the property of the Power Company, subject to the lien of its said mortgage and to the provisions of this agreement; and in that case to retain the proceeds of such sale. The Columbia Company shall have the right to require the Power Company to obtain releases, and exercise any

and all other rights with respect to the Power development which, under the provisions of Article IX of the Power mortgage, it could obtain or exercise if it were the mortgagor therein, and the Power Company, on demand of the Columbia Company, shall do everything necessary in connection therewith.

Twelfth. If one or more of the following events shall happen, that is to say:

(*a*) One or more of the "events of default" specified in Section 2 of Article VI of the Power mortgage shall occur and shall have continued for the period, if any, specified with respect thereto in said Section 2;

(*b*) The Columbia Company shall make default in the payment of any of the sums of money by the terms of Article III of this agreement payable by it and such default shall continue for the period of sixty days after such sum shall be payable;

(*c*) The Columbia Company shall make default in the observance or performance of any of the other terms or conditions of
290 this agreement to be observed or performed by it, and such default shall have continued for the period of sixty days, after written notice thereof to the Columbia Company with request that the same be remedied;

(*d*) A receiver shall have been appointed for all or any part of the property of the Columbia Company by a Court having jurisdiction, or proceedings for such receivership shall have been instituted with the consent of the Columbia Company;

then, in any such case, the Power Company, its successors and assigns, may, by notice in writing given to the Columbia Company, terminate this agreement, and thereupon the Power Company shall be entitled to resume control of the Power development and all extensions thereof and additions thereto, and from thenceforth to operate the same for its own use and benefit, and for its own use to take and receive all the earnings, income and profits thereof, the same as if this agreement had never been entered into. Such right to terminate this agreement and to resume possession and operation of the Power development is not intended to be exclusive of any other remedy or remedies, but such remedy shall be cumulative and shall be in addition to every other remedy now or hereafter existing in favor of the Power Company at law or in equity or by statute or Constitution.

This agreement is also subject to termination:

(*a*) By the trustee under the Power mortgage in case of the happening of any of the events of default specified in Section 2 of Article VI thereof and the continuance thereof for the period, if any, in said Section 2 specified with respect thereto; and

(*b*) By the purchaser at any sale of the Power development, made pursuant to the provisions of said mortgage, provided that

notice of intention to exercise such right to terminate this agreement be given to the Columbia Company within the period of ninety days from and after such sale.

291 From and after the date of the termination of this agreement in any of the ways in this Article XII enumerated above, the obligation of the Columbia Company, as between it and the Power Company, to make any of the payments specified in Article III of this agreement, shall cease and determine; but the Columbia Company shall, as between it and the Power Company, remain liable for all payments under said Article III due and unpaid at the date when this agreement shal so terminate, and also for a proportionate part, accrued to said date, of the next payments to fall due under said Article III, and also for all breaches of the terms and conditions of this agreement committed prior to said date; Provided, That the Columbia Company shall nevertheless remain liable to the extent of its guaranties endorsed upon the Power bonds and upon the preferred stock certificates of the Power Company, respectively.

Upon the termination of this agreement in any of the ways hereinabove in this Article XII enumerated, the Power development shall forthwith be delivered to the Power Company by the Columbia Company, free from floating indebtedness and from taxes, assessments and other governmental charges, and in at least as good order and condition as would result from due performance of this agreement by the Columbia Company up to the date of such termination hereof and so that there shall be no depreciation thereof except such as is naturally incident to a hydro-electric plant and system properly maintained.

This agreement may be modified at any time by an agreement in writing between the parties hereto, in any particular not involving the release of the Columbia Company from its obligation to operate the Power development and to make repairs and replacements thereof and maintain and insure the same, or from its obligation to make all the payments to be made as provided in

292 in Article III of this agreement, or from its obligation to observe and perform the terms and conditions to be observed and performed by the Power Company under the Power mortgage and which shall not affect any of the rights or obligations established by Articles XIII, XIV and XV of this agreement; and any of the provisions of this agreement, whatsoever, may be modified in any particular (provided that no such modification or change whatsoever shall affect the obligation of the Columbia Company upon its guaranties to be endorsed upon the bonds and the preferred stock certificates of the Power Company) by an agreement in writing executed by the parties hereto and approved in writing by the trustee under the Power mortgage and by the holders of a majority in amount of each class of the stock of the Power Company, acting personally or by their attorneys.

Thirteenth. For the observance and performance of the terms and conditions by it to be observed and performed hereunder, and for all violations of any thereof, each party hereto solely is liable

and no recourse for the satisfaction of any demand or claim based thereon shall be had against any promoter, stockholder, officer or director of such party, either directly or otherwise, by the enforcement of any assessment or otherwise or by any other legal or equitable proceeding or in any other manner.

Fourteenth. This agreement shall be a lien upon the Power development and every part thereof; and this agreement and every condition and covenant thereof shall run with the real estate comprised in the Power development and every part thereof. This agreement and all of the provisions thereof and the lien thereof are, however, and at all times shall be, subject to the lien of the Power mortgage, but shall not be subordinated to the lien of any other mortgage, so long as any of the preferred stock of the Power Company
293 shall be outstanding and not owned by the Columbia Company, without the consent in writing or the affirmative vote of the holders of a majority in amount of the preferred stock of the Power Company.

Nothing in this agreement shall limit or impair the right of the Power Company, subject to all the provisions hereof, to make any conveyance of all or substantially all its property and rights at the time subject hereto, together with this agreement and all its rights hereunder, as an entirety: Provided, That such conveyance shall be on such terms as to preserve and not to impair the rights of the Columbia Company hereunder and the lien of this agreement, and that the grantee shall, as a part of such conveyance, assume all the obligations of the Power Company hereunder and agree to keep and perform all the terms and conditions in this agreement required to be kept and performed by the Power Company, and shall, simultaneously with the delivery of any such conveyance, execute and deliver to the Columbia Company a proper instrument whereby it shall assume all such obligations and agree to observe and perform all such terms and conditions.

The Columbia Company shall have the right to assign this agreement and all its rights hereunder to any other person or corporation who shall purchase and acquire the entire estate and properties of the Columbia Company, but not otherwise: Provided, That such assignment shall be upon such terms as to preserve and not to impair the rights of the Power Company hereunder, and that the assignee shall, as a part of such assignment, assume all the obligations of the Columbia Company hereunder and agree to keep and perform all the terms and conditions in this agreement required to be kept or performed by the Columbia Company, and shall, simultaneously with the delivery of any such assignment, execute and deliver to the Power Company a proper instrument whereby it shall assume all such obliga-
294 tions and agree to observe and perform all such terms and conditions.

This agreement shall benefit not only the parties hereto, but their respective successors, and, if such as permitted by the foregoing provisions of this Article XIV, but not otherwise, their respective assigns.

Each party hereto, its successors and, if such as permitted by the foregoing provisions of this Article XIV, but not otherwise, its assigns, shall at all times be entitled to specific performance of and otherwise to enforce the covenants and obligations of the other party hereto: Provided, however, That in case this agreement shall be pledged under the Power mortgage, the Columbia Company shall not be entitled to specific performance of or otherwise to enforce the covenants and obligations of the Power Company hereunder as against a receiver of the Power Company appointed in aid of the foreclosure of said mortgage or a purchaser of the property thereof upon foreclosure unless such receiver or such purchaser, as the case may be, shall have duly adopted this agreement.

Fifteen. In case any differences or disputes shall arise between the parties hereto in respect of any of the matters herein contained every such difference or dispute shall be referred for settlement to three arbitrators, one appointed by the Power Company, one appointed by the Columbia Company, and the third appointed by the two others so chosen. In case, after notice by either party, the other shall decline for thirty days to appoint an arbitrator for the purpose of settling any such difference or dispute or shall withdraw its arbitrator previously appointed, or in case the two arbitrators appointed by the parties as herein provided shall fail for the space of ten days after such appointment to select a third arbitrator, either party may make written application to a Judge
295 of any Court of the United States for the Eastern District of South Carolina for the appointment of the necessary arbitrator or arbitrators to make up the number of three. Such arbitrators before entering upon their duties shall take oath that they have no interest of any kind in either party, and that they will faithfully and honestly discharge the duties committed to them. The matter in dispute shall forthwith be submitted to said arbitrators, and each party shall do all things necessary to make a proper submission according to the character of the controversy or as required by the arbitrators. The decision of a majority of said arbitrators in respect of the matter or thing submitted to them shall be final and conclusive, and each party shall accept the same accordingly.

Sixteenth. The Power Company shall forthwith cause this agreement to be recorded in the office of the Clerk of Court in the counties of Lexington, Newberry and Fairfield, South Carolina, and as real and personal property forming part of the Power development shall from time to time be acquired in other counties, shall cause this agreement to be there recorded, and shall do everything necessary or proper by law to keep this agreement a lien upon the Power development and every part thereof.

In witness whereof, the parties hereto have caused this agreement to be signed in their respective corporate names, by their respective Presidents or Vice Presidents, and impressed with their respective

corporate seals, attested by their respective Secretaries or Assistant Secretaries, all as of the day and year first above written.

297 EXHIBIT 20

Contract of April 6, 1905, between Columbia Water Power Company and Columbia Electric Street Railway, Light and Power Company:

This was an agreement by the Columbia Water Power Company to sell the canal property and its holdings in Richland county to the Columbia Electric Street Railway, Light and Power Company. Among other things, the following appear:

"II. That the said Water Power Company shall grant, assign, transfer and set over unto the said Railway Company all of its water power plants and water franchises, subject to existing power contracts and contracts with employees, and all of its other property rights and assets whatsoever, including the stock of the Saluda Manufacturing Company, for the sum of six hundred thousand ($600,000) dollars in cash and for three thousand (3,000) full paid shares of the said preferred stock, and three thousand (3,000) full paid shares of the common capital stock of the said Railway Company. Said grant, assignment and transfer to be made subject to the legal operation and effect of bonds aggregating two hundred thousand ($200,000) dollars, now secured by a first mortgage upon the canal and water rights now belonging to the said Water Power Company, but said transfers shall include all of the rights of the said Water Power Company in one hundred thousand ($100,000) dollars of mortgage bonds of the West Shore Railway Company, now deposited by the said Water Power Company to secure the payment of the interest on said two hundred thousand ($200,000) dollars of bonds.

"V. This agreement is made between the parties hereto subject to the following express conditions:

"Third. That the said Railway Company shall be satis-
297 fied, after receiving a full statement of the earnings and expenses of the said Water Power Company, that it has, during the twelve months ending the first day of January in the year nineteen hundred and five, earned a net income of not less than seventy-five thousand ($75,000) dollars.

"Fourth. That the said Water Power Company shall be satisfied, after being put in possession of all the figures relating to the earnings and expenses of the said Railway Company, that its gross earnings for the year ending April 1, 1905, are approximately one hundred and sixty thousand ($160,000) dollars, and that it can be safely operated at an operation cost not greater than sixty (60) per cent. of its gross earnings."

EXHIBITS 21 AND 22.

Letters from Secretary of War and United States Attorney General.

RPS-WCH—173454. WCH-ECT

Department of Justice,

Washington, D. C., June 3, 1920.

T. C. Williams, President
Columbia Railway and Navigation Co.,
Columbia, South Carolina.

DEAR SIR.

In accordance with the promise made to Mr. Person, I enclose herewith a copy of a letter sent to the United States Attorney at Charleston, South Carolina, relative to the Parr Shoals Dam, and also a copy of the engineers' report upon the subject.

These papers speak for themselves.

Respectfully,
For the Attorney General, R. P. STEWART,
Assistant Attorney General.

Enclosure No. 30358.

298 (Copy.)

In reply to 94923: 148 Engrs. LHB-mms.

War Department,

Washington, May 20, 1920.

The Honorable the Attorney General.

SIR:

I have the honor to refer to my letter of March 13, 1920, on the subject of the obstruction to navigation on the Congaree River below Columbia, S. C., resulting from operation of the Parr Shoals Dam on the Broad River, tributary to the Congaree. In the concluding paragraph of that letter, I stated that this Department was then engaged in collecting data on the subject and that a report and recommendation concerning the action regarded as tenable and advisable would be submitted as soon as this was accomplished.

I now enclose a report submitted by the District Engineer, Charleston, S. C., under date of May 4, 1920, which very clearly covers the case. From this report, it is evident that this dam has been so operated in the past during the times of low water as to substantially alter or modify the condition and capacity of the channel in the Congaree River. It is further apparent that, were the dam

so operated that no part of the flow of the Board River were ponded behind the dam during periods of low water, navigation would not be so affected.

The Secretary of War has issued, in 1914, an order prohibiting such ponding. While the Company has claimed that this order has been observed, yet their interpretation of the acts necessary to the observance does not result in a fulfillment of the intent of the order.

The only effective action to be taken to prevent the improper influence of the Parr Shoals dam upon the low water flow of the Broad River would be to require the construction of a regulating dam further down stream as mentioned by the District Engineer in paragraph 7-(*b*).

Very respectfully,

(Sgd.) NEWTON D. BAKER,
Secretary of War.

6 Inclos., viz: 94923, 148-153.—Report.

RPS—173454-16. WCH-ECT.

June 2, 1920.

Francis H. Weston, Esq.,
United States Attorney,
Charleston, South Carolina.

SIR:

I beg to call your attention again to the case of the obstruction to the navigable capacity of the Congaree River by the dam owned and operated by the Parr Shoals Dam Company at the Parr Shoals on the Broad River. This case was referred to you by department letter of October 16, 1914. At that time Secretary of War Garrison had held a hearing on the matter. In addition to the fact that the dam had been built without authority of Congress, or of the Secretary of War as required by Section 10 of the River and Harbor Act of March 3, 1899, c. 425, Comp. Stats., Sec. 9910, and by Section 7 of the River and Harbor Act of September 19, 1890, c. 907, 26 Stat. 454, the Secretary found "that the maintenance and operation of the power dam in question works a serious injury to the navigable capacity of the Congaree River." The Secretary denominated the case as a "flagrant one," the offending company as "obstinate," and the navigation interests as "seriously affected;" and requested this Department to take action to correct the evil. All of the papers transmitted to this Department by the Secretary of War, including a report of the Chief of Engineers, were sent to you with said letter of October 16, 1914 (and are presumably still in your files), and you were instructed to take such action to correct the evil as you deemed warranted.

You replied to Department letter of October 16th on November 10th, going fully into the case and giving reasons why the Broad River should be considered part of the navigable waters of the United States and why the dam was an illegal structure. From your letter of November 27th it appears that you had prepared a bill in

equity to abate the dam as a nuisance under the provisions of Section 10 of the River and Harbor Act of September 19, 1890, Comp. Stats., Sect. 9910*a*, but at that time there was a difficulty as to obtaining sufficient evidence to warrant Court of Equity in finding that the dam in question obstructed the navigable capacity of the Congaree River.

On November 27th the Acting Secretary of War advised this Department that the problem of determining the effect of the dam on the flow of the Congaree River was a complicated one, necessitating very careful observations. Such observations (it was stated) were being made, and until they were completed this Department was requested to suspend proceedings. This Department could not do other than acquiesce in the request of the War Department, and you were accordingly instructed on November 27, 1914, to suspend all proceedings until further advised.

Nothing further was heard of the matter until it was called to the attention of this Department about November 14, 1919, by Mr. T. C. Williams, President of the Columbia Railway and Navigation Company. Probably part of the cause for this inaction was
301 due to the war, part to Secretary Garrison's leaving the War Department. The matter was immediately taken up again by this Department with the War Department, but the latter desired to investigate the present status of the matter, and later to collect the data necessary for legal proceedings, if legal proceedings were to be commenced.

These investigations of the War Department have apparently now been completed, and I enclose herein the report of the District Engineer at Charleston to the Chief of Engineers with the accompanying appendices of which it is an abstract. In sending these papers, the Secretary of War says:

"From this report, it is evident that this dam has been so operated in the past during the times of low water as to substantially alter or modify the condition and capacity of the channel in the Congaree River. It is further apparent that, were the dam so operated that no part of the flow of the Broad River were ponded behind the dam during periods of low water, navigation would not be so affected.

"The Secretary of War has issued, in 1914, an order prohibiting such ponding. While the company has claimed that this order has been observed, yet their interpretation of the acts necessary to the observance does not result in a fulfillment of the intent of the order.

"The only effective action to be taken to prevent the improper influence of the Parr Shoals dam upon the low water flow of the Broad River would be to require the construction of a regulating dam further down stream as mentioned by the District Engineer in paragraph 7-(*b*)."

302 You will have no trouble in identifying that portion of the engineer's report which deals with what the Secretary calls "the only alternative to be taken."

Section 10 of the Act of September 19, 1890, supra, gives two remedies where a dam obstructs the "navigable capacity" of any waterway of the United States, one by criminal prosecution, the other by bill in equity. As to the criminal prosecution, a heavy fine, and (in the case of individuals) imprisonment not exceeding one year, is provided, and it would seem that each continuance of the obstruction for one week would constitute a separate offense, unless dams are excepted under the words "similar structures erected for business purposes." Prima facie, dams are not similar to bridges, docks, etc., and perhaps this is borne out by the special treatment of them in the Dam Acts, e. g., Act of June 21, 1906, c. 3508, 34 Stat. 386 (in force when the Parr Shoals dam was erected), which, in Section 5, makes each monthly default a separate offense. In a criminal prosecution, however, the proof would have to be beyond a reasonable doubt, and, while continuous convictions with their heavy penalties would no doubt bring to an end the operation of the dam in such a way as to obstruct navigable capacity, there would not be much flexibility in the procedure.

In regard to procedure by bill in equity, while, abstractly, the case need only be made out by the preponderance of the testimony, of course a Court of Equity would not absolutely abate as a nuisance a large, established, public business of this character unless the proof that it obstructed the navigable capacity of a waterway of the United States was clear and positive. On the other hand, however, a Court of Equity need not (it is believed) make an absolute decree of abatement, but may make such a decree on terms, e. g.,
303 provided the defendant does not within a certain time do certain things, prescribed by the Court, to itself do away with the nuisance. And such a decree would, of course, contain the usual reservation of right to apply for enforcement or modification at any time. Having such large powers, a Court of Equity might not require such positive or technical proof as a Criminal Court undoubtedly would.

The main question in the case (no matter how it is presented) is, of course, one of fact, viz., whether the dam does or does not obstruct the navigable capacity of the Congaree River. Upon this question, you will have to rely to some, perhaps to a great, extent upon proof furnished by the War Department, and it is hoped that their investigations, as embodied in the papers sent you, will this time be sufficient. A copy of this letter and of the engineer's report will be sent to Mr. T. C. Williams, referred to above, and you are requested to avail yourself of his suggestions and assistance in the matter of procuring proper and sufficient proof.

As to the law of the case, your attention is called to the authorities sent you in this Department's letter of November 13, 1914, and especially to United States v. Rio Grande Irrigation Company, 174 U. S., 703, which seems very much in point.

This Department has concluded that a bill in equity under the authority of Section 10 of the Act of September 19, 1890, c. 907, Comp. Stats. 9910 *a*, to remove the dam as an unlawful obstruction should be filed just as soon as it can be done, and this letter may be

taken as authority to that end. It is suggested that the bill prepared by you in 1914 might be used with such changes as the further investigations may advise. At any rate the main point is to get the cause at issue by subpœnas and answers as soon as possible.
304 The question of proof, or of any satisfactory agreement out of Court (if any such agreement be possible), to be embodied in a decree of Court, can be taken up later. This case has been unwarrantably delayed (of course, without any fault whatsoever on your part), and it should now be definitely brought to an issue at the earliest possible moment.

Respectfully,

For the Attorney General, ——————,
Assistant Attorney General.

Enclosure No. 30352.

EXHIBIT 23.

Tax reports of defendant and Parr Shoals Power Company. Omitted.

EXHIBITS 24 AND 25.

Government reports on river. Omitted.

EXHIBIT 26.

Omitted.

EXHIBIT 27.

Letter of W. H. Gibbes, Mayor of Columbia:

To the General Assembly of South Carolina.

GENTLEMEN:

In the matter of House Bill No. 1072 and Senate Bill No. 853. Title: "A Bill to Authorize and Empower Columbia Railway, Gas and Electric Company to Construct and Maintain a Dam in and Across the Congaree River and Columbia Canal, at or Near the Confluence of Broad and Saluda Rivers, for the Purposes Mentioned Therein."

Certain objections that have been brought forward to the passage of the above mentioned Bill have come to my attention,
305 through the media of a publication in the State newspaper of this date (February 13, 1912) and communications (anonymous, by the way) which have been printed and disseminated among the members of the Legislature.

My purpose in addressing you upon the subject, which I do officially, as Mayor of the city of Columbia, and on behalf of the City Council, is to place ourselves and our position clearly and

dispassionately before you, and to clear ourselves of the imputation necessarily contained in the communications referred to, if they be true, that the Council has acted unwisely, hastily and without due regard to and consideration of the rights and the welfare of the community, in recommending to your body the passage of the Bill referred to above, just as it was first presented to your honorable body, shorn of the amendments that have been suggested to you, and which tend to deprive the Bill of its usefulness. It is hardly necessary for me to suggest to you that if the contentions of the gentlemen making to you the communications alluded to are correct, then the City Council was wrong in passing its resolution recommending the enactment of this Bill; and if it is to the interest of the State and of the city of Columbia that their views should prevail, then it is evident, by implication, that the recommendations of the City Council are assumed not to be founded upon just considerations of public good. I indulge myself in these preliminary remarks in order that you may understand fully why I am addressing you in this manner; because I feel that it is my duty and my privilege to justify the action of the City Council in connection with this matter, which has been anonymously attacked in the communication referred to.

When it was proposed by the gentlemen in interest to have this Bill introduced, they conceived that the construction of the dam and appurtenances provided for therein would involve the creation of certain conditions that would or might affect the status quo of the water supply of the city of Columbia. In order that no harm might ensue to the city, and for the purpose of securing unanimity of action, they duly advised the Council of their purpose, and arranged with us for a full consultation with regard to their project, and eventually, before its introduction into the General Assembly, submitted to the City Council a draft of their proposed Bill. After some unimportant changes were made in the draft of the Bill, suggested by the City Council, it was officially brought before Council at a meeting on January 29, 1912, and at that meeting the Council passed the following resolution:

"Whereas, This City Council has been requested to express its opinion as to a Bill recently introduced into the Legislature by the Richland County Delegation to authorize the Columbia Railway, Gas and Electric Company to construct and maintain a dam across the Congaree River and the canal below the confluence of the Board and Saluda Rivers, which Bill was submitted to this Council before its introduction;

"Be it resolved, That it is the sense of the Council that the passage of the said Bill would be beneficial to the city of Columbia and its citizens, and that by the provisions thereof the rights and interests of the city are sufficiently safeguarded and protected."

Now, gentlemen, that resolution, officially adopted by the City Council of the city of Columbia, embodies the duly considered and deliberate judgment of the Council with regard to the matter. I wish to assure you that every aspect of the matter was weighed by

the Council, and by its members especially charged with the
307 supervision of the legal affairs of the city, and, as the terms of the resolution clearly express, it was determined that the proposed Bill, not only safeguarded the rights and interests of the city, but that the passage of the Bill would be beneficial to the city of Columbia and its citizens, and it is my desire to reaffirm that belief.

I wish to assure you that Council knew what it was doing; it had considered carefully and discussed the question, as it related to the particular rights of the city as well as to the public weal, and it appreciated what the conditions were in connection with the contract to be made.

Furthermore, the passage of this Bill, according to the conception of the City Council, in no way contravenes the rights of the State concerning any previous contracts, but it does give a new starting point for development.

When this Bill was before the Council for consideration the effect that its passage might have upon navigation was not overlooked. I wish to point out to you, however, that one of the things the opponents to the passage of the Bill particularly desire, or profess to desire, to bring about, is the opening of the abandoned canal south of Gervais street. As to the cost of doing this work (placed at the modest sum of $150,000 by one of the writers on the subject) we are scarcely concerned, except that it might remark that the figure certainly looks extremely reasonable for a mile and a half of heavy excavating through marshy lands that would have to be kept by retaining walls from caving in and filling the proposed canal. But we understood when we considered the propsed Bill, as we understand now, that the United States Government purposes, and is maturing engineering plans, to make navigable the Congaree River up to a point opposite Senate street, which would enable boats to come up to that
point and discharge their cargoes right in the heart of the
308 city, bestowing on the city, with regard to the delivery of its freight and with regard to the effect that water competition may have upon freight rates, all the benefits that would flow from the opening of the canal below Senate street under the most favorable conditions. The United States Government has constructed and maintains at great expense a lock and dam below Columbia, which it purposes to elevate, for the express purpose of affording more water in the Congaree River up to Senate street in order that boats may be brought up to that point. Our natural and logical reflection was that such instrumentalities would more efficiently meet the needs of river transportation into Columbia than an artificial canal, which would have not only to be built at great expense, but maintained at great cost to the State. As reasonable men we could see no need for a navigation canal, necessarily limited in its capacity, running up to Senate street (paralled) with a broad river made, or to be made, efficiently navigable by the United States Government; so that we quite naturally dismissed that aspect of the matter from consideration as being entirely useless and irrelevant. We did not see how we could take any other position as reasonable men: it seemed to us

that it was a sufficient indication of enterprise and good intention on the part of the Columbia Railway, Gas and Electric Company that it should expend an enormous sum of money in entering upon this work and developing the power as proposed by it, without requiring them to go to the further useless expense involved in opening the canal south of Gervais street, in view of the Federal Government's design to make the river navigable to Senate street, which would simply mean the abandonment of the canal, below that point, if it were opened.

Now, with regard to the navigation of the Broad River, I wish to submit that we considered also that phase of the matter, al-
309 though we could not see then and do not see now how the construction of the proposed dam could affect adversely any navigation possibilities that may be resident in that river. In fact, since the Bill provides for a lock in the upper end of the canal of the same character and dimensions as exists there now, and as the construction of a higher dam will operate to raise the waters in the Broad River considerably above the present surface level, we conceive that the effect upon navigation there would be highly beneficial. But, notwithstanding what has been said on the subject, there seems very little basis for the hope that the Broad River offers any possibilities in the way of navigation for anything but a chimerical boat. I assume that you gentlemen are in possession of the facts, but there is one report that may have escaped your attention, or, rather, two reports, and those are reports of two engineers of the United States Engineering Corps made to the Chief Engineers, U. S. Army, and by him transmitted to Congress, in December, 1907, and January, 1908. The first report is that of Captain E. R. Stuart, Corps of Engineers, dated December 20, 1907, and covers an inspection of the "Congaree River and Broad River from its mouth to Ninety-Nine Island Shoals." I shall not burden you with numerous quotations from this report, but the engineer's conclusions are summed up in these words:

"Based upon this examination and the information obtained, I am of the opinion that the portion of the river in question (i. e., from its mouth to Ninety-Nine Island Shoals) is unworthy of improvement by the General Government."

In the second report, dated January 13, 1908, Col. R. L. Hoxie, Corps of Engineers, referring to the same river, uses the following language:

310 "The river has numerous rock shoals and is obstructed by a number of fixed dams constructed for power purposes. Diligent inquiry has failed to elicit any definite information as to the beneficial effects of improving the stream, and the Board has received no communications on this subject from interested parties invited to submit arguments on behalf of the improvement. From the facts presented the Board (the Board of Engineers for Rivers and Harbors) concurs with the district officer and the division engineer in

the opinion that Broad River, from its mouth to Ninety-Nine Island Shoals, is not worthy of improvement by the United States."

That sort of language, I submit, from the high authorities mentioned, charged with the duty of determining whether or not navigable schemes are feasible projects or mere fancies, authorities possessed of the facts and competent to pass thereon, seems to be more or less conclusive with regard to the question of the navigation of the Broad River; and, as I have said, it was only after due consideration of the Bill from every viewpoint that Council made the favorable recommendation of the Bill.

The development project contemplated by this Bill would give a tremendous impetus to the industrial and commercial interests of Columbia; it would not interfere with the navigation of the Congaree River up to Senate street; there is no navigation of the Broad River north of Columbia worthy of the serious consideration of any one, the possession of which or the absence of which, could affect freight rates one iota; the navigation of the Congaree to Senate street by the river itself will effect all the competition that could rationally be expected to arise; and as the passage of this Bill jeopardizes none of these interests, we hate to have the Bill hung up by un-
311 necessary amendments and amendments that would, if passed, make the Bill practically worthless and inoperative.

As I have undertaken to say, the resolution of City Council was adopted in the full light of the facts, which were considered carefully, and it is the desire of the Council, as expressed in that resolution, that the Bill should pass, preferably in the form in which it was introduced.

February 13, 1912.

W. H. GIBBES,
Mayor, City of Columbia.

EXHIBITS 28, 29, AND 30.

Included in Exhibit 8.

EXHIBIT 31.

Statement showing power generated at canal. Omitted.

EXHIBIT 32.

Contract of May 26, 1892, between South Carolina Penitentiary and Columbia Electric Street Railway, Light & Power Company. Omitted.

EXHIBIT 33.

Statement of C. M. Tew showing gross earnings. Omitted.

EXHIBIT 50.

A. 1914. Wyche Resolution—House.

(House No. 1333.)

This was a Joint Resolution introduced in the House on February 6, 1914, referred to the Judiciary Committee and reported, majority favorable and minority unfavorable, on February 12, 1914.
312 No further action was taken on it. (H. J. 1914, pages 686, 846.)

The Resolution read as follows:

1914—H. No. 1333.

A Joint Resolution in Regard to the Completion of the Columbia Canal.

Whereas, The construction of the Columbia Canal was entered upon by the State of South Carolina largely for the benefit it would be to navigation, as appears by Act of the General Assembly heretofore passed, and to afford a connection between Broad River and the Congaree River, two navigable streams, thus affording passage of commerce from the upcountry to the sea coast; and,

Whereas, By Act of the General Assembly of December 24th, 1887, page 1090, and Acts amendatory thereof, the Board of Trustees of the Columbia Canal were authorized and directed to convey the said canal and all its franchises and appurtenances to any person or corporation upon certain contingencies therein named—"subject, nevertheless, to the conditions and limitations herein described on the part of said Board of Trustees and their assigns," one of which conditions and limitations was, as stated in said Act, "And shall, as soon as it is practicable, complete the canal down to Congaree River, a few yards above the mouth of Rocky Branch; and,

Whereas, The said Board of Trustees conveyed the said property to the Columbia Water Power Company, by deed appearing of record, which deed requires of said company the performance of said obligations; and,

Whereas, By subsequent conveyance, the said canal and its franchises have now become the property of the Columbia Railway, Gas and Electric Company; and,

313 Whereas, Although more than twenty years have elapsed since the said enactments and said sale, yet the said canal has never been completed, as clearly was intended and contemplated; and,

Whereas, The completion of the same was a material consideration moving the State in selling and conveying the said canal and its franchises; and,

Whereas, Ample time has elapsed in which to complete the same, and within which it was practicable to do so, and it has not been done; and,

Whereas, It is for the benefit of the people of Columbia, as well as the State at large, that the said canal be completed speedily and navigation be opened up; and,

Whereas, By such failure on the part of the owners of said canal to perform said conditions and live up to their obligations, they have forfeited their rights in all said property; therefore,

Be it resolved by the General Assembly of the State of South Carolina:

Section 1. That all the right, title and interest of the owners of the Columbia Canal and its property and franchises, be, and the same is hereby, declared forfeited, and let the same revert to the State of South Carolina: Provided, That said forfeiture be, and is hereby, waived, however, if said owners shall complete the same, as hereinafter provided.

Sec. 2. That within ninety days from the adoption of this Resolution, the owners of said canal shall actually begin, in good faith, the construction and completion of that portion of the canal, not before completed, in accordance with the specifications set forth in previous enactments, and, within eighteen months from the passage of this Resolution, they shall complete the same to its terminus, a few yards above the mouth of Rocky Branch, on Congaree River;
314 same to be constructed with suitable and appropriate locks at the lower end thereof.

Sec. 3. That upon the failure of said owners of said canal, or their assigns, to comply with the preceding section, as to beginning said construction, and as to the completion thereof, either or both, it shall be the duty of the Attorney General to bring such action or actions as may be advised, in the name of the State, in any of the Courts of this State having jurisdiction, for the purpose of compelling the completion of said canal in accordance with the terms of Acts and contracts heretofore passed and entered into, and as required herein, or for the purpose of declaring and adjudging a forfeiture of rights therein and causing the reversion of the same to this State, or as the Court may determine, and he is empowered to bring either or both such actions or proceedings or any other proceedings which he may deem for the best interests of the State, to carry out the purpose of this Resolution.

Sec. 4. The Attorney General is authorized to employ competent counsel to assist him in all such proceedings, and the sum of $2,000, if so much be necessary, is hereby appropriated to defray the expenses of such litigation, including counsel fees; the same to be paid by the State Treasurer out of moneys not otherwise appropriated,

upon the warrant of the Attorney General, duly itemized and certified by him to be reasonable and necessary in said proceedings.

Sec. 5. That a copy of this Resolution, duly certified, be served upon the president or some other officer of the company which owns said canal, or upon any individual owning the same, immediately after its passage.

315 B. 1917. Mauldin Resolution—House.

(House No. 642.)

This Resolution was introduced in the House on February 10, 1917, but no further action was taken on it. (H. J. 1917, page 542.)

This Resolution was entitled: "A Joint Resolution to provide for the appointment of a committee to investigate the rights of the State of South Carolina in the Columbia Canal, and the advantages of developing same, and to report in regard thereto; with full power to examine witnesses, obtain legal and expert advice, and to report the same."

C. 1917. Ketchin Resolution—Senate.

(Senate No. 286.)

This Resolution was introduced in the Senate on January 31, 1917. It was reported favorably by the Judiciary Committee on February 9, 1917, passed second reading *in* February 13, 1917, and tabled on February 14, 1917. (S. J. 1917, pages 227, 419, 501, 539.)

The title read as follows:

"A Joint Resolution in regard to completion of the Columbia Canal, and to provide for its reversion to the State, and disposition of same."

D. 1910. Dixon Resolution—House.

(House No. 1092, Senate No. 1236.)

Introduced (H. J. 1910, page 252), reading as follows:

316 *Concurrent Resolution.*

H. 1092.

Mr. Dixon proposed the following:

Mr. Dixon: A Concurrent Resolution to provide investigation and report of Governor upon advisability of requiring lessees to comply with terms of lease from State and complete Columbia Canal in accordance with lease.

Whereas, The Columbia Canal constructed at great expense to the State of South Carolina primarily as a navigable highway and waterway connecting the waters of the Congaree and Broad rivers

was assigned, transferred and released by the State to the city of Columbia, its lessees and successors, by Act approved December 24, 1887, and Acts amendatory thereto; and,

Whereas, In consideration of the rights, benefits and franchises appurtenant to said cause said lessees assumed certain duties and obligations to the State, one of which was the requirement as set out, inter alia, in Section 7 of said Act, "shall, as soon as practicable, complete the canal down to the Congaree River," etc.; and,

Whereas, On the — day of March, next, it will be eighteen years since work on the construction of said canal was suspended, and said canal completed only to Gervais street, in the city of Columbia; and,

Whereas, In order to get appropriations from Congress for the improvement of the navigation of the Broad River above Columbia, it is necessary that the State require the said city and its lessees to complete the canal down to the Congaree River; and, further,

Whereas, The city of Columbia undertook to obstruct said canal by constructing its water mains across the same, which obstruction the Supreme Court declared to be a public nuisance; Now, therefore,

Be it resolved by the House of Representatives, the Senate concurring:

317 First. That it is to the interest of the State that said canal be completed to the Congaree River in accordance with the terms of the conveyance and lease from the State.

Second. That his Excellency, the Governor, be requested to investigate and examine into the advisability of requiring of said lessees the completion of said canal in accordance with the original plan of construction as contemplated by the said Act, and report the same to the General Assembly at its next session.

Referred to the Committee on Judiciary.

Reported as follows (H. J. 1910, page 519):

Mr. Fraser, from the Committee on Judiciary, submitted a favorable report, with amendment, on

H. 1092.

Mr. Dixon: A Concurrent Resolution to provide investigation and report of Governor upon advisability of requiring lessees to comply with terms of lease from State and complete Columbia Canal in accordance with lease.

Ordered for consideration tomorrow.

Amended as follows (H. J. 1910, page 601):

Second Reading Bill.

The following Bill was taken up, read the second time, amended, agreed to, and ordered sent to the Senate:

H. 1092.

Mr. Dixon: A Concurrent Resolution to provide investigation and report of Governor upon advisability of requiring lessees to comply with terms of lease from State and complete Columbia Canal in accordance with lease.

The Committee proposed the following amendment:

Amend by striking all of the first paragraph of the Resolution.

And further amend by striking out the word "second" at the beginning of second section and insert in lieu thereof the word "first."

Which was agreed to.

318 The Bill, as amended, was then ordered to a third reading tomorrow.

The Resolution, as amended, was adopted by the House on February 12, 1910, and sent to the Senate, agreed to and ordered returned to the House with concurrence on February 15, 1910. (S. J. 1910, page 492.)

The Resolution was received by the House with the Senate concurrence on February 16, 1910. (H. J. 1910, page 750.)

E. 1910. Graydon Resolution—Senate.

(Senate No. 1158—House No. 1399.)

Introduced (S. J. 1910, page 119), reading as follows:

Concurrent Resolution Presented.

S. 1158.

Mr. Graydon: A Concurrent Resolution to provide investigation and report of Governor upon advisability of requiring lessees to comply with terms of lease from State and complete Columbia Canal for navigation in accordance with lease.

Whereas, The Columbia Canal, constructed at great expense to the comply with terms of lease from State and complete Columbia Canal State of South Carolina, primarily as a navigation highway and waterway con-ecting the waters of the Congaree and Broad rivers was assigned, transferred and released by the State to the city of Columbia, its lessees and successors, by Act approved December 24, 1887, and Acts amendatory thereto; and,

Whereas, In consideration of the rights, benefits and franchises appurtenant to said canal said lessees assumed certain duties and obligations to the State, one of which was the requirement as set out, inter alia, in Section 7 of said Act, "shall, as soon as practicable, complete the canal down to the Congaree River," etc.; and,

319 Whereas, On the — day of March next it will be eighteen years since work on the construction of said canal was suspended, and said canal completed only to north side of Gervais street, in the city of Columbia; and,

Whereas, In order to get appropriations from Congress for the improvement of the navigation of the Broad River above Columbia it is necessary that the State require the said city and its lessees, to complete the canal down to the Congaree River; and, further,

Whereas, The city of Columbia undertook to obstruct said canal by constructing its water mains across the same, which obstruction the Supreme Court declared to be a public nuisance; now, therefore,

Be it resolved by the Senate, the House of Representatives concurring, That his Excellency, the Governor, be requested to investigate and examine into the advisability of requiring of said lessees the completion of said canal for navigation in accordance with the original plan of construction as contemplated by the said Act, and report the same to the General Assembly at its next session.

Ordered for consideration tomorrow.

The Resoluton was adopted by the Senate and sent to the House for concurrence on February 14, 1910. (S. J. 1910, page 471.)

The Resolution was received by the House on February 14, 1910 (H. J. 1910, page 613), and referred to the Judiciary Committee; favorably reported on February 15, 1910 (H. J. 1910, page 676); and agreed to by the House on February 18, 1910 (H. J. 1910, page 819), and ordered returned to the Senate with concurrence.

It was received by the Senate with concurrence on February 18, 1910. (S. J. 1910, page 611.)

320 F. 1911. Johnson Resolution—Senate.

(Senate No. 561—House No. 729.)

The Resolution was introduced in the Senate, reading as follows (S. J. 1911, page 459):

Concurrent Resolutions Proposed.

S. 561.

Mr. Johnson. A Concurrent Resolution referring a Concurrent Resolution passed February 16, 1910, and enacted upon by the Governor, to the present Governor for action thereon.

Whereas, A Resolution concurred in February 16, 1910, was not acted upon, which Resolution reads as follows:

A Concurrent Resolution to provide investigation and report of Governor upon advisability of requiring lessees to comply with terms of lease from State and complete Columbia Canal in accordance with lease.

Whereas, The Columbia Canal, constructed at great expense to the State of South Carolina, primarily as a navigable highway and waterway connecting the waters of Congaree and Broad rivers, was assigned, transferred and released by the State to the city of Columbia, its lessees and successors, by Act approved December 24, 1887, and Acts amendatory thereto; and,

Whereas, in consideration of the rights, benefits and franchises appurtenant to the said cause, said lessees assumed certain duties

and obligations to the State, one of which was the requirement as set out, inter alia, in Section 7 of said Act, "shall, as soon as practicable, complete the canal down to the Congaree River," etc.; and,

Whereas, On the — day of March, next, it will be eighteen years since the work on the construction of said canal was suspended, and said canal completed to Gervais street, in the city of Columbia; and,

321

Whereas, In order to get appropriations from Congress for the improvement of the navigation of the Broad River above Columbia it is necessary that the State require the said city and its lessees to complete the canal down to the Congaree River; and, further,

Whereas, The city of Columbia undertook to obstruct said canal by constructing its water mains across the same, which obstruction the Supreme Court declared to be a public nuisance; now, therefore,

Be it resolved by the House of Representatives, the Senate concurring:

First, That it is to the interest of the State that said canal be completed to the Congaree River in accordance with the terms of the conveyance and lease from the State.

Second, That his Excellency, the Governor, be requested to investigate and examine into the advisability of requiring of said lessees the completion of said canal in accordance with the original plan of construction as contemplated by the said Act, and report the same to the General Assembly at its next session; and,

Whereas, Said canal has been decreed by the Supreme Court to be a navigable waterway and highway of this State, the completion of which will materially subserve the welfare of the city of Columbia and State at large; now, therefore,

Be it resolved by the Senate, the House of Representatives concurring

That the attention of the Governor be directed to the said Concurrent Resolution, and that he be requested to take such final action thereon as will best subserve the public interests of the State.

Ordered for consideration tomorrow.

322

The Resolution was adopted by the Senate and ordered sent to the House for concurrence on February 16, 1911. (S. J. 1911, page 715.)

The Resolution was received by the House on February 16, 1911 (H. J. 1911, page 847), and immediately agreed to and ordered returned to the Senate with concurrence.

It was received by the Senate with the concurrence of the House on February 17, 1911. (S. J. 1911, page 736.)

G. 1913. Welch and Weston Bills—House and Senate.

(House No. 495—Senate No. 462.)

These were companion Bills in the House and Senate, which provided that if the Columbia Railway, Gas and Electric Company should construct and maintain a line of electric or steam railroad between the city of Columbia and the Congaree River, at Rocky

Branch, that it should be relieved of any obligation to complete or extend the canal under the Act of 1887.

The House Bill (House No. 196) was introduced on February 7, 1913, reported without recommendation on February 12, 1913, and continued, under a blanket motion to continue all second reading Bills, on February 17, 1913. (H. J. 1913, pages 501, 656, 778, 791.)

The Senate Bill (Senate No. 162) was introduced on February 15, 1913, reported without recommendation on February 18, 1913, and continued on February 19, 1913. (S. J. 1913, pages 521, 593, 614.) It was recommitted on January 22, 1914, and reported without recommendation on February 25, 1914, and laid upon the table under a general motion on February 26, 1914. (S. J. 1914, pages 239, 949, 989.)

323 H. 1915. Etheredge Resolution—House.

(House No. 696.)

This Resolution was introduced in the House on February 17, 1915, reading as follows (H. J. 1915, page 846):

Concurrent Resolution.

H. 696.

Mr. Etheredge proposed the following

Mr. Etheredge: A Concurrent Resolution

Be it resolved by the House of Representatives, the Senate concurring:

1. That the Attorney General be, and he is hereby, authorized and directed to make a full and complete examination into all matters concerning the Columbia Canal, in which the State has, or may have an interest, and to take such steps as may be necessary for the complete protection of the interest of the State in said canal.

2. That the Attorney General report the result of his investigation, together with such recommendations as he deems proper to the next session of the General Assembly.

Ordered for consideration tomorrow.

It was tabled and withdrawn on January 11, 1916. (H. J. 1916, page 34.)

I. 1916. a La Grone Resolution—House.

(House No. 1658.)

This was introduced in the House on February 19, 1916, reading as follows (H. J. 1916, page 1173):

324 *Concurrent Resolution Adopted.*

H. 1658.

Mr. La Grone introduced the following:

Mr. La Grone: A Concurrent Resolution to authorize and direct the Attorney General to institute legal proceedings to ascertain and enforce the proper and other rights of the State in the Columbia Canal.

Be it resolved by the House of Representatives of the State of South Carolina, the Senate concurring:

Section 1. That the Attorney General be, and he is hereby, authorized and directed to proceed with all convenient speed, to institute legal proceedings to ascertain and enforce the property and other rights, both legal and equitable, of the State of South Carolina in the Columbia Canal. And he is hereby required to make a full report of his acts and doings in connection with the matters stated and contemplated by the provisions of this Resolution.

Which was adopted and ordered sent to the Senate.

This Resolution was received by the Senate on February 19, 1916, and ordered for consideration tomorrow. (S. J. 1916, page 841.) No further action was taken on it.

Motion for Directed Verdict.

Thereupon, the defendant made a motion for a directed verdict upon six grounds in writing, which are correctly quoted in the exceptions.

The Court ruled: I cannot grant the motion. It is overruled.

Requests to Charge.

Thereupon, defendant's attorneys handed the Court certain requests in writing, furnishing plaintiff's counsel with a copy. Plaintiff's attorneys submitted certain requests to the Court, but did not furnish defendant's counsel with a copy thereof.

325 *Argument to Jury.*

The Court allowed each side two hours for argument to the jury, with one hour extra to plaintiff to reply. The Attorney General opened for the State, followed by Mr. Lyles; Mr. Lyon then spoke, followed by Mr. Herbert, and Mr. Abney closed for plaintiff. Upon the conclusion of Mr. Abney's argument the Court of its own motion ruled and charged as follows:

Ruling and Charge.

The Court: At the conclusion of the arguments before the jury, the Court asked counsel in reference to the requests of counsel for the plaintiff, which requests in their entirety practically amount to asking for the direction of a verdict on the question as to the right of the plaintiff to recover the property in dispute, whether there was any issue to present to the jury as to the alleged failure of the defendant and its predecessors entitled to perform the conditions in the Act of 1887, requiring the completion of the canal to a point near the mouth of Rocky Branch, on the Congaree River.

Thereupon, counsel was heard.

Now, in reference to the construction of the Act of March 12, 1917, the Act recites that notwithstanding the lapse of time from December 24th, 1887, to the present date, the Board of Trustees of the Columbia Canal, or its assigns, have failed and neglected to fulfil the condition above set forth and have refused to perform the said conditions, and have neglected to keep in proper repair and open for navigation, the canal, etc., and then enacts that the conditions of the Act of the General Assembly above mentioned; that is, the Act of 1887, and Acts amendatory or supplementary thereto, have not been complied with, but same have been disregarded, and by reason thereof the right of the defendant to the said Columbia
326 Canal, its appurtenances and the lands held therewith, have been forfeited and reverted to the State.

Under the view that the Court takes of the Act of 1887, it requires the canal to be completed down to Gervais street by December 24, 1894, and contemplated that the rest of the canal to the point near Rocky Branch, should be completed as soon thereafter as practicable, that is, after the completion to Gervais street, as soon thereafter as practicable.

The evidence shows that it has not yet been completed.

There is testimony as to the time that would probably be taken for completion, which fixes the time for completion from eighteen months to two years, but I think as much as four years, I believe it was, in one case, possibly. Possibly it may have been six years, or perhaps it was four.

Now, there has been a lapse of time from December, 1894, down to March, 1917, and it has not yet been completed.

The declaration of the General Assembly that failure to complete the canal within the time mentioned was a failure to fulfil the conditions contained in the grant, is entitled to some respect, but the Court in this proceeding has the right to inquire into the facts and determine whether or not the facts as found by the Legislature were true.

And, under the evidence showing the time that would have been taken to do the work, had it been started, and the circumstances and conditions surrounding the parties and the canal since 1894, it seems to me that the Court must conclude that the finding of the General Assembly was justified and not arbitrary.

And under the evidence, the Act of the Legislature declaring the forfeiture: that is, the Act of March 12th, 1917, is binding on the Court under the evidence; and under the evidence the issue as
327 to whether or not it was practicable for the defendant or its predecessors in title to have completed the canal before March 12th, 1917, need not be submitted to the jury.

GENTLEMEN OF THE JURY:

Under the view that I have taken of the law of this case, the evidence is not such as justifies me in leaving to you the question whether or not the defendant has failed to perform the conditions upon which it held the Columbia Canal.

Under the Acts of the Legislature relating to the Columbia Canal, and the deeds to the defendant and its predecessors in title, the defendant and its predecessors in title took the property, subject to the condition that they would be required to complete the canal from the locks at the north end down to Gervais street, within seven years from December 24th, 1887; that is, by the 24th of December, 1894; and that they would also thereafter, that is, after the 24th of December, 1894, and as soon as it should be practicable, complete the canal down to the Congaree River, a few yards above the mouth of Rocky Branch.

The testimony shows that the canal has never been completed below Gervais street, or between Gervais street and Rocky Branch.

The Act which provides for the completion of the canal contemplated the completion of the canal before December 24th, 1918, and within such time as should be practicable to have completed it.

The requirement of the Act contemplated that the defendant and its predecessors in title should, after December 24th, 1894, act promptly—with reasonable promptness, in proceeding to complete the canal, and I charge you that the only inference to be drawn from the testimony in this case is that the defendant and its predecessors in title have failed to perform this condition, which I have just stated, in the grant under which they held the Columbia
328 Canal; and, therefore, that the Legislature was justified in declaring the canal forfeited to the State by the Act of 1917.

I, therefore, direct you to find a verdict for the plaintiff for the property in dispute.

There is one other question to be submitted to you, and to be passed upon by you, according as you view the testimony in this case—the evidence in this case.

The plaintiff alleges that the defendant has received income from the Columbia Canal since the 20th of August, 1917, when the representatives of the State demanded that the defendant turn over the canal to them. This allegation is denied by the defendant, and the burden is upon the plaintiff to prove that the defendant received such income from the canal, or to prove the rental value of the canal, and the defendant would be liable, under the law, to the plaintiff for such amount as you may find, if any, was the rental value of the canal from the 20th of August, 1917, down to this date; or such

amount as the defendant has actually received as income from the canal during that period, if any.

You have heard the testimony on that question, and it is for you to say what, if any, is the rental value of the canal; or what rents or income, if any, the defendant has received from the canal.

You are to determine this question from the evidence in the case which you have heard, and write your verdict, according as you find the facts.

So that I charge you to find a verdict for the plaintiff for the property in dispute.

And add, if you find anything is due the State for rental value, or income received from the canal by the defendant, so many dollars damages.

So, gentlemen, it is for you to say what income, if any from the canal has been received, or what is the rental value of the
329 canal during the period I have mentioned; that is, from August 20th, 1917, up to the time of the commencement of this action, which is the 11th day of December. That would be three months and twenty-one days.

Mr. Lyles: We would request your Honor that you submit to the jury one verdict on the complaint, since you have directed it, that "We find under the direction of the Court," etc., and as to the other verdict, of course, they write their own verdict.

The Court: The form I have written is, "Under the direction of the Court, we find for the plaintiff the property in dispute."

Mr. Foreman, you sign this verdict, and if you find the plaintiff has proven that the defendant has received any income from this canal during the period that I have mentioned; that is, from August 20th, 1917, down to December 11th, 1917, or has proven the rental value of the property during that period, you will find a verdict for the plaintiff in that amount, writing it out, "We find for the plaintiff" so many dollars damages; or, if you find that the plaintiff has failed to prove any rental value of the property, or income from the property, you will find your verdict in this form, "We find for the plaintiff no damages."

Either, "We find for the plaintiff" so many dollars damages, or, "We find no damages." Write it out in words and not in figures.

The Foreman: I think there was some testimony as to——

The Court: I can't tell you what the testimony is.

The Foreman: Would we be justified in taking into consideration the improvements?

The Court: You mean deducting the improvements?

Mr. Lyles: I think you did not catch the question.

The Court: It would be the canal, unimproved, just the canal as it was when they got it.

330 The form of your verdict I have already stated to you. You may retire and consider your verdict.

Verdict.

The jury thereupon returned the following verdict:

"Under the direction of the Court we find for the plaintiff the property in dispute.
July 6, 1920.

W. D. HOLLAND
Foreman.

"We find for plaintiff no damage.
July 6, 1920.

W. D. HOLLAND
Foreman."

Appeal Perfected.

Plaintiff duly entered judgment on the verdict for the property in dispute and for costs.

Notice of intention to appeal to the Supreme Court was duly served by defendant and this case, with exceptions, duly served, settled or agreed to pursuant to the statutes and rules of Court.

The supersedeas bond was fixed at $100,000 and duly filed.

Exceptions.

I. That his Honor erred in directing a verdict for plaintiff for the property in dispute when there was substantial evidence tending to establish the following propositions of fact, which were in issue by the pleadings:

a. That the plaintiff had never demanded completion of the canal;

b. That plaintiff had received all the substantial benefits expected to accrue to it under the contract of purchase by defendant's predecessors and any failure by defendant had been merely technical and had resulted in no substantial loss or damage to plaintiff.

331 *c.* That defendant had for many years sought to adjust the question of completion with plaintiff and made reasonable and substantial efforts to do so—all the while plaintiff receiving substantial benefits from defendant under the canal contract and allowing defendant to proceed with the development of the canal and place substantial improvements thereon—without warning defendant of its intention to demand completion and without demanding completion.

d. That defendant had actually offered to complete the canal according to the letter of its contract immediately upon the judgment of the Supreme Court of South Carolina that it was obligated so to do.

e. That a reasonable time under all the circumstances had not, in fact, elapsed for completion.

f. That under all the circumstances the drastic remedy of forfeiture should not have been adjudged without giving further time.

g. That the Federal Government, soon after the Act of December 24, 1887, was contemplating and did subsequently commence and complete a dam across the Congaree River, only a short distance above the mouth of Rocky Branch, to develop river navigation to Columbia, and that this rendered the completion of the canal to the river useless and impracticable for navigation purposes and that such completion of the canal would have interfered with the project of the Federal Government by diverting the water of the river around such dam.

h. That the completion of the canal to the river according to the terms of the Act of December 24, 1887, never became practicable because it would have been of no aid to navigation.

i. That soon after the passage of the Act of December 24, 1887, the methods of developing and transmitting hydraulic power
332 were materially changed so that it was no longer advisable to locate factories between the canal and the river and the extension of the canal to the river was impracticable for this reason and for the further reason that such extension thereof would not have developed sufficient additional hydraulic power to pay the cost of such extension.

j. That the course of conduct and action of plaintiff justified defendant in believing that plaintiff did not desire completion of the canal to the river, in that, notwithstanding the constant agitation of the matter before the General Assembly it failed to demand completion of defendant.

And such issues should have been submitted to the jury.

2. That in directing a verdict for plaintiff his Honor erred in construing the Act of December 24, 1887, and in ruling as follows: That such Act required the canal to be completed down to Gervais street by December 24, 1894, and contemplated that the rest of the canal, from Gervais street down to the Congaree River, should be thereafter completed within such time as defendant, or its predecessor, could reasonably have done the work of construction and that the work should have been started promptly after December 24, 1894.

This was error upon the following grounds:

a. That such ruling violated the judgment of the Supreme Court of South Carolina on the first appeal in this case which adjudged that the obligation to complete the canal down to the Congaree River "as soon as is practicable," imposed by the Act of December 24, 1887, meant within a reasonable time under all the circumstances—that is, that defendant had a reasonable time under all the circumstances, within which to start the work of completion as well as within which to do the work.

b. That the obligation to complete the canal down to the Congaree River "as soon as is practicable," imposed by the Act of De-
333 cember 24, 1887, was not definite and did not require defendant to start or accomplish the work of completion within a *define* time, but merely within a reasonable time, under all the circumstances—considering the amount, character and cost of the work imposed upon defendant as well as the purposes sought to be accomplished, the benefits then expected to accrue to plaintiff from the completion, the benefits that have in fact continuously resulted to plaintiff under the contract, and the benefits that experience and changed circumstances show would have resulted to plaintiff from completion.

c. That the obligation did not definitely rest upon defendant to start or accomplish completion of the canal down to the river, under pain of forfeiture, under all the circumstances, without a demand from plaintiff to defendant so to do.

3. That his Honor erred in construing the Act of March 12, 1917, as follows: That said Act was in effect a legislative construction that the Act of December 24, 1887, required defendant to start the work of completion promptly after December 24, 1894, and required the work to be carried through to completion promptly under penalty of forfeiture; and that under the evidence such legislative declaration of forfeiture in the Act of March 12, 1917, was justified and not arbitrary and was binding on the Court, and erred in directing a verdict on such ground.

This was error upon the following grounds:

a. That such construction of the Act of March 12, 1917, and ruling was in violation of the construction given said Act by the Supreme Court of South Carolina on the former appeal in this case, wherein said Supreme Court adjudged that, in said Act of 1917, the Legislature did not undertake to adjudicate anything, but merely declared that, in its opinion, a forfeiture had been incurred and directed a judicial investigation and determination of the
334 question in accordance with law, that is, the law in effect prior to the Act of 1917.

b. That by such construction and effect given the Act of March 12, 1917, the Court below gave weight and effect to a legislative declaration and enactment of forfeiture of the property and contract rights of defendant under a contract to which the State of South Carolina was itself a party and deprived defendant of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

c. That by such construction and effect given the Act of March 12, 1917, it became a law impairing the obligation of defendant's contract with the State of South Carolina under the Act of 1887, as amended by the Act of 1890, and the deeds to defendant and its

predecessors thereunder, in violation of Section Ten of Article One of the Constitution of the United States.

4. Because his Honor should have granted a nonsuit and directed a verdict for defendant, for the reasons stated in defendant's ground of such motions, as follows:

"1. Because there is no condition subsequent working a forfeiture in defendant's contract with the State of South Carolina under the Act of 1887 as amended by the Act of 1890, and the Act of 1917, together with the acts of the officers of the State thereunder authorized, including the commencement of this action, and any judgment that may be rendered against the defendant herein impairs the obligation of the defendant's contract with the State, in violation of Section 10 of Article I of the Constitution of the United States."

5. Because his Honor should have granted a nonsuit and directed a verdict for defendant, for the reasons stated in defendant's ground of such motions, as follows:

335 "2. Because there is no condition subsequent working a forfeiture in defendant's contract with the State of South Carolina, made under the Act of 1887, as amended by the Act of 1890, and the Act of 1917, together with the acts of the State officers thereunder, including the commencement of this action, and any judgment that may be rendered against defendant herein, deprives defendant of its property without due process of law and denies to defendant the equal protection of the laws, in violation of the 14th amendment of the Constitution of the United States."

6. Because his Honor should have granted a nonsuit and directed a verdict for defendant, for the reasons stated in defendant's ground of such motions, as follows:

"3. Because there is no evidence tending to show a demand for performance made upon defendant by the State."

7. Because his Honor should have granted a nonsuit and directed a verdict for defendant, for the reasons stated in defendant's ground of such motions, as follows:

"4. Because plaintiff has not established a case upon which there is any evidence for the jury to find a forfeiture."

8. Because his Honor should have granted a nonsuit and directed a verdict for defendant, for the reasons stated in defendant's ground of such motions, as follows:

"5. Because, in defendant's contract with the State of South Carolina, made under the Act of 1887, as amended by the Act of 1890, the obligation rested upon the State of South Carolina to demand performance of defendant before it would have the right to have a forfeiture adjudged against defendant because of the violation of any alleged condition subsequent in the contract; and the Act of 1917, together

with the acts of the officers of the State thereunder authorized, including the commencement of this action, and any judgment that may be rendered against the defendant herein, impairs the
336 obligation of defendant's contract with the State, in violation of Section 10 of Article I of the Constitution of the United States and deprives defendant of its property without due process of law and denies to defendant the equal protection of the laws, in violation of the 14th amendment to the Constitution of the United States, because there has been no demand for performance made by the State as required by such contract."

9. Because his Honor should have directed a verdict for defendant, for the reasons stated in defendant's ground of motion, as follows:

"6. Because it appears undisputed in the testimony that the State of South Carolina has stood by and received material benefits under such contract over a long period of years and that if defendant is in default it is only as to a portion of its obligation, or obligations, under the contract, and that under such circumstances the State has not made any express demand for performance upon defendant, but has stood by and received benefits, knowing that defendant and defendant's predecessor were expending large sums of money in improvements on the canal; and that the Court will not adjudge a forfeiture under such circumstances."

10. That his Honor erred in admitting in evidence the opinion of the Supreme Court of South Carolina in the case of State ex rel. Lyon, Attorney General, v. Columbia Water Power Company et al., 82 S. C., 181, 85 S. C., 113, and 90 S. C., 568, over defendant's objection that the same was irrelevant because not responsive to any allegation of the complaint and not admissible as matters of record or res adjudicata, and the further reason that no adjudication of forfeiture was made in such record.

11. That his Honor erred in allowing plaintiff to introduce in evidence the legislative record of the Dixon Concurrent Resolution of 1910, the Graydon Concurrent Resolution of 1910, the
337 Johnson Concurrent Resolution of 1911, the Welch and Weston Bills of 1913, the Etheredge Concurrent Resolution of 1915, and the La Grone Concurrent Resolution of 1916, over defendant's objection (*a*) that they were irrelevant, because under our Constitution a Concurrent Resolution would not be sufficient action by the State to amount to a demand, to affect defendant's rights, since our Constitution requires three readings and the Governor's signature, which a Concurrent Resolution does not receive; and (*b*) that they were irrelevant because their language does not amount to any demand for completion.

WM. ELLIOTT,
J. B. S. LYLES,
R. B. HERBERT,
W. C. McLAIN,
Defendant's Attorneys.

This is the case for appeal as settled by me, with the amendments allowed, this 24th February, 1921.

W. H. TOWNSEND,
Trial Judge.

Stipulation.

The above — foregoing is the case as settled by the order of Judge W. H. Townsend.

(Sd.) J. FRASER LYON,
Attorneys for Plaintiff.

(Sd.) J. B. S. LYLES,
Attorneys for Defendant.

Columbia, S. C., March —, 1921.

338 No. 2

THE STATE OF SOUTH CAROLINA,
Richland County:

In the Supreme Court, April Term, 1919.

THE STATE OF SOUTH CAROLINA, Respondent,

vs.

COLUMBIA RAILWAY, GAS and ELECTRIC COMPANY, Appellant.

Affirmed.

Opinion by D. E. Hydrick, A. J.

(Filed 26 August, 1919.)

The State brought this action to obtain a judgment of forfeiture of the rights of defendant in and to the Columbia canal, and to recover possession thereof. The complaint alleges that the state was the owner of the canal, and, in pursuance of an act of the legislature, in 1887 (19 Stat. 1090), it was conveyed to a board of trustees "for the use and benefit of the city of Columbia, for the purposes hereinafter in this act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the said board of trustees and their assigns: Provided, That should the said canal not be completed to Gervais street within seven years from the passage of this act all the rights, powers and privileges guaranteed by this act shall cease, and the said property shall revert to the State;" that it had been completed nearly to Gervais street something more than half its proposed length, and the trustees were required to carry it on to the point where it was to empty into the Congaree river, as soon as practicable, and provisions were made therein for that purpose; that, in 1892, in pursuance of an act of 1890, amending the act of 1887 (20 stat. 967),

the trustees conveyed it to the Columbia Water Power Company, "subject, nevertheless, to the conditions, limitations, provisos, and exceptions" contained in said acts; and, in 1905, the Water
339 Power Company conveyed it in like manner, to defendant; that the chief inducement to the conveyance of the property by the state was to open navigation through the canal around the shoals in the Congaree and Broad rivers at and near their confluence, and develop the water power thereof south as well as north of Gervais street, all of which is provided for in minute detail by the terms of the acts referred to; that nothing has been done toward the completion of the canal south of Gervais street, notwithstanding it has long since been practicable to have done so, and defendant has allowed it to be obstructed, so as to prevent the navigation thereof north of that street, and has abandoned the completion thereof, and the development of the water power contemplated south of that street; that by an act of 1917 (30 stat. 343), the legislature declared that the rights of defendant in and to said property had been forfeited and the same had reverted to the state, on account of the failure to perform the conditions upon which it had been granted, and the attorney-general and other agents of the State therein named were directed to take such steps and institute such action as they might deem proper to recover possession thereof, unless defendant should, within ninety days after the passage thereof, make satisfactory arrangements with said officers and agents with reference thereto, as therein provided; and that defendant declined to make any arrangements whatever with regard thereto, and denied any obligation to perform the conditions of the grant.

Defendant sought to remove the case to the Federal court, on the ground that the act of 1917 was in effect a denial of due process of law, and an attempt by legislative fiat to impair the obligation of the state's contract. Judge Memminger refused to order removal, on the ground that no Federal right was involved, and that defendant could contest the validity of the act of 1917 in the state court as well as in the Federal court. Thereafter, the Federal court remanded the case, on the ground that no right under Fed-
340 eral law was necessarily involved.

There was no error in refusing the application for removal. Taylor v. Anderson, 234 U. S. 74; Arkansas v. Kansas & Texas Coal Co. 183 U. S. 185. Besides, when the Federal court remanded the case, it was the duty of the state court to proceed as though no removal had been attempted. Railroad Co. v. Koontz, 104 U. S. 5; St. Paul &c. R. Co. v. McLean, 108 U. S. 212; Empire Co. v. Towboat Co. 59 S. C. 549.

Defendant demurred to the complaint for insufficiency, on several grounds, the one chiefly relied upon being that the act of 1887 does not contain apt words to create a condition subsequent, the breach of which would work a forfeiture. Judge Townsend overruled the demurrer in an opinion which will be reported. The conclusions therein announced are fully supported by the authorities cited.

While courts lean against a construction which creates a condition subsequent, because that works forfeiture which often results in un-

conscionable hardship, they have no power by construction to make or modify contracts or statutes. Their power and duty is limited to the discovery of the intention therein expressed, and to giving it effect; and, if it is clear that forfeiture has been provided for and incurred, it is as much the duty of the court to enforce it, as any other lawful provision, except, of course, in cases where the court has power to relieve against it, and the circumstances call for the exercise of that power.

The purpose of construction is to find out the intention, however it may be expressed, whether in apt and technical words, or otherwise; and that which is clearly implied is as good as if expressed. No particular phraseology and no technical words are necessary to create a condition subsequent; and even that which is expressed as a condition may be held to be only a limitation or restriction, and vice versa, if it clearly appears that such was the intention;
341 and when such condition is created, provision for reverter or re-entry for breach thereof is not indispensable, since these are but remedies which follow the breach as legal consequences. It makes little difference therefore that the statute does not provide for reverter or re-entry.

The legislative intention must be gathered from the language of the statute—not that found in any particular section or proviso, but from the statute as a whole—and it must be read in the light of all the circumstances, the situation and relation of the parties, the subject of the grant, and the purpose to be attained.

It appears from the numerous acts of the legislature relative to the canal that the dominant purpose in providing for its construction was the improvement of navigation in the Congaree and Broad rivers, and to make it possible to obviate the obstruction caused by the shoals at and near their confluence. That purpose runs as an unbroken thread through the entire legislative history of the project, and nowhere does it appear more clearly than in the act of 1887, wherein it is so clearly expressed that no grantee thereunder can be heard to say that he did not contract with reference to it; and, so far as completed, the canal has become a part of the navigable waters of the state, and, as such, impressed by the constitution with a trust for the public benefit. State v. Water Power Co., 82 S. C. 181. The other purposes contemplated, such as the development of water power, were incidental and subsidiary, but, nevertheless, important.

Having in mind the purposes and subject matter of the grant, let us consider the words thereof. It was made, "subject to the performance of the conditions and limitations herein prescribed." These words are apt and sufficient to manifest the intention that the continuance of the estate granted was to depend upon the
342 doing of the things prescribed, in other words, to make performance of them conditions subsequent, the breach of which would result in forfeiture.

Appellant argues that, as the proviso to section 1, above quoted, does create a condition subsequent and provides for forfeiture and reverter for breach thereof, in apt and technical language, under the

rule, expressio unius, no other like condition was intended, or it would have been expressed in like manner. The argument fails to appreciate the circumstances. The proviso expresses a particular intention relative to a comparatively small part of the work, and is not inconsistent with the general intention previously declared; it was not intended therefore to be restrictive of it. The general intention was that the grant should be subject to the performance not of one but of all the things required to be done.

On the issue of waiver, appellant has called attention to the act of 1912 (27 stat. 779) in which there is a provision which indicates the intention to allow such further time for completion of the work as might be fixed by the court. That shows no intention to waive the right to have the canal completed, but rather the contrary. Besides, the allowance of further time was conditioned upon acceptance of the terms of the act, and it does not appear that that was done. Therefore, it cannot avail appellant on demurrer, which admits the allegation that a reasonable time has elapsed, and that appellant has refused to do the work at all. Whether a reasonable time has, in fact, elapsed, and whether, under all the circumstances, the drastic remedy of forfeiture should be adjudged, without giving further time, are questions upon which we express no opinion, since they are matters of defense, and will depend upon the facts and circumstances developed at the trial. There is authority for the proposition that where no time is fixed for the performance of a condition, a reasonable time is intended, and no default can,
343 ordinarily, attach until after a demand and refusal to perform. 3 Elliott on Contracts, sec. 2098. But as said, all that is a matter of defense, and is not open to consideration on demurrer.

The act of 1917 violates no constitutional right of defendant. The legislature did not undertake to adjudicate anything, but merely declared that, in its opinion, a forfeiture had been incurred, and directed a judicial investigation and determination of the question in accordance with law. The action is to enforce the obligations of the contract and not to impair them.

Judgment affirmed.

We concur:

EUGENE B. GARY, *C. J.*
R. C. WATTS, *A. J.*
T. B. FRASER, *A. J.*
GEO. W. GAGE, *A. J.*

A true copy.

Attest:

[Seal of Supreme Court of South Carolina.]

HARRY McCAW,
Clerk.

344 STATE OF SOUTH CAROLINA,
Richland County:

In the Supreme Court, Fifth Circuit.

No. 68.

THE STATE OF SOUTH CAROLINA, Respondent,

against

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, a Corporation Created by and under the Laws of South Carolina, Appellant.

Opinion by T. B. Fraser, A. J.

(Filed 26 November, 1921.)

For all practical purposes this case was tried and determined on demurrer. See 112 S. C., 528. It is enough here to say that it has been decided that the complaint states a cause of action for forfeiture for a breach of condition, and if the plaintiff has proved its allegations, it is entitled to the judgment sought. The complaint alleges that the State was, at one time, the owner of the Columbia Canal, and conveyed it away on the condition that the grantees would so complete it. That (page- 538-539) it appears from the numerous acts of the Legislature, relative to the cause, that the dominant purpose in providing for its construction was the improvement of navigation in the Congaree and Broad Rivers, and to make it possible to obviate the obstruction caused by the shoals at and near their confluence. That purpose runs as an unbroken thread through the entire legislative history of the project and nowhere does it appear more clearly than in the Act of 1887, wherein it is so clearly expressed that no grantee thereunder can be heard to say that he did not contract with reference to it; and so far as completed, the canal has become a part of the navigable water of the State, and, as such impressed by the constitution with a trust for the public benefit. That the words used are apt and sufficient to manifest the intention that the continuance of the estate granted was to depend upon the doing of the thing prescribed; in other words, to make per-
345 formance of them conditions subsequent, the breach of which woule result in forfeiture.

That the conditions existed and that they had not been performed was not questioned in the evidence. It was also held that no time for the completion of the canal from Gervais Street to Rocky *Rock* Branch, the lower terminus, was fixed by the Statute, and therefore a reasonable time was allowed. The evidence showed, (not disputed) that two years is a reasonable time. The facts (undisputed) are that many times two years have passed and the canal still incomplete. Section 19 of the Act of 1887 directs the Board of Trustees to offer inducements for the speedy erection of factories on the

canal below Gervais Street. While a reasonable time was allowed, the Act called for speed.

This Court also held that the Court has no power to waive the conditions. The Plaintiff proved its case by undisputed and indisputable evidence. There was nothing, therefore, for Judge Townsend, the presiding Judge, to do but to direct a verdict for the Plaintiff in the question of forfeiture.

I. What has been said disposes of the first question, as to a directed verdict, unless some of the other questions are sustained.

II. The second assignment of error is that there was no demand for performance, but there was an offer to complete the canal.

As already stated, the former case held that the purpose to complete the canal "runs as an unbroken thread through the entire legislative history of the project."

It is true the defendant now makes an offer to complete the canal, but the offer comes too late. The Act of 1917, pg. 348, while declaring a forfeiture, allows the defendant ninety days, not to complete the canal, but to make "arrangements or agreements" for its completion. Instead of trying to make an "arrangement" or "agreement" to complete the canal, the defendant raised the question of its obligation to complete the canal. The ninety days of grace had expired before the offer was made, and the Courts cannot
316 extend the time. This point cannot be sustained.

III. "That there was error in construing Act of 1917 and giving force and effect to the legislative declaration of Forfeiture."

His Honor said the Act of 1917 was binding on the Court under the evidence. It is binding not as a judicial decree, but it was binding in that it stated the conditions under which the State would waive the forfeiture and the evidence showed that the condition had not been complied with. This point can not be sustained.

IV. Error in construing "as soon as practicable." His Honor held "The requirement of the Act contemplated that the defendant and its predecessors in title should, after December 24th, 1894, act promptly, with reasonable promptness in proceeding to complete the canal." The Act of 1887 used the word "speedy." There was no error in the ruling of his Honor. He did not say immediately. There is no error here.

V. Questions under the Constitution of the United States. Appellant's argument says:

"Exceptions 4 and 5 raise the points that the Act of 1917, and the acts of the State officers therein authorized, violate the impairment and due process clauses of the federal constitution, upon the theory that there was no condition subsequent in defendant's title to the canal. This same point was raised by exceptions 11, 12, and 14 on the former appeal and decided against us—the Court holding both that there was a condition subsequent in the grant and that the Act of 1917 was constitutional.

The Court may feel compelled to hold these exceptions res adjudicata. Vermillion v. Woman's College, supra. However, we do not waive them, and would appreciate a statement that they are renewed here." The former ruling is affirmed.

VI. Error in admitting testimony.

The State offered in evidence the case of State Ex Rel. Lyon, Attorney General, vs. Columbia Water Power Company, et al.,
347 82 S. C. 81; 85 S. C., 113; 90 S. C., 568. The cases played no part in the decision of this case, and were at most harmless error. This assignment of error *or* overruled.

VII. The Appellant alleges error in not holding that the forfeiture is not complete because the State did not re-enter. This can not be sustained, because it has been held in the State in White vs. Britton, 75 S. C., 138, and other cases, that where re-entry is not practicable, re-entry is not necessary. The forfeiture was declared by the Statute. The direction to the Attorney General to bring suit was a sufficient demand. It was impracticable and highly improper and much to the advantage of the defendant that it was not forceably ejected by the irresistable power of the State. The defendant, pending a decision of the rights of the parties, has enjoyed the profits during the litigation and it cannot complain.

The Judgment appealed from is Affirmed.

We concur:

EUGENE B. GARY, *C. J.*
R. C. WATTS, *A. J.*

Cothran, A. J. disqualified. (See over.)

I sat with the Court upon the hearing of the appeal in this case, but have taken no part in the discussion or decision for the following reasons: At the time of the passage of the Act, in 1917, I was a member of the House of Representatives and took an active part in the preparation of the Bill, in its advocacy, and in the final draft of the Free Conference Committee's Report, which was adopted by both Houses. It has occurred to me, since the argument of the appeal, that I cannot with propriety, participate in the decision.

T. P. COTHRAN,
Associate Justice.

A true copy.

Attest:

[Seal of Supreme Court of South Carolina.]

HARRY McCAW,
Clerk.

348 STATE OF SOUTH CAROLINA,
Richland County:

In the Supreme Court, Fifth Circuit, April Term, 1921.

THE STATE OF SOUTH CAROLINA, Respondent,

against

COLUMBIA RAILWAY, GAS & ELECTRIC COMPANY, a Corporation Created by and under the Laws of the State of South Carolina, Appellant.

Order Staying Remittitur.

Upon reading and filing the annexed Petition, it is ordered, That the remittitur herein be stayed pending the further order of the court.

T. B. FRASER,
Associate Justice.

Sumter, S. C., December 3rd, 1921.

349 STATE OF SOUTH CAROLINA,
Richland County:

In the Supreme Court, Fifth Circuit, April Term, 1921.

THE STATE *Company,* Respondent,

against

COLUMBIA RAILWAY, GAS & ELECTRIC COMPANY, a Corporation Created by and under the Laws of the State of South Carolina, Appellant.

Petition for Stay of Remittitur and Rehearing.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court:

Your petitioner, the above named appellant, respectfully prays that the remittitur in this case be stayed and a rehearing of the case ordered upon the following grounds:

I. Because the Supreme Court as constituted upon the hearing and determination of the above entitled cause, was without jurisdiction, under the Constitution and laws of South Carolina to hear and determine the cause;

in that:

(*a*) It was not an "entire court" within the meaning of sections 2 and 12 of Article V of the Constitution of South Carolina 1895.

(*b*) Since Mr. Justice Cothran was disqualified and no acting associate justice appointed in his stead and in the place of Mr.

Justice Gage, deceased, the court was without jurisdiction to hear the cause under section 6 of Art. V of the Constitution of 1895.

350 With reference to subdivision (*a*) of ground I above, the Constitution of South Carolina 1895 by sections 2 and 12 of Article V provides as follows:

"Sec. 2. Supreme Court.—The Supreme Court shall consist of a Chief Justice and four Associate Justices, any three of whom shall constitute a quorum for the transaction of business. The Chief Justice shall preside, and in his absence the senior Associate Justice. They shall be elected by a joint viva voce vote of the General Assembly for the term of ten years, and shall continue in office until their successors shall be elected and qualified, and shall be so classified that one of them shall go out of office every two years."

"Sec. 12. Three Necessary for Reversal.—Constitutional Questions.—Judge Shall Not Sit.—In all cases decided by the Supreme Court the concurrence of three of the Justices shall be necessary for a reversal of the judgment below, subject to the provisions hereinafter prescribed. Whenever, upon the hearing of any cause or question before the Supreme Court, in the exercise of its original or appellate jurisdiction, it shall appear to the Justices thereof, or any three of them, that there is involved a question of constitutional law, or of conflict between the Constitution and laws of this State and of the United States, or between the duties and obligations of her citizens under the same, upon the determination of which the entire Court is not agreed; or whenever the justices of said Court, or any two of them, desire it on any cause or question so before said Court, the Chief Justice, or in his absence the Presiding Associate Justice, shall call to the assistance of the Supreme Court

351 all of the Judges of the Circuit Court: Provided, however, That when the matter to be submitted is involved in an appeal from the Circuit Court, the Circuit Judge who tried the cause shall not sit. A majority of the Justices of the Supreme Court and Circuit Judges shall constitute a quorum. The decision of the Court so constituted or a majority of the Justices and Judges sitting, shall be final and conclusive. In such case the Chief Justice, or in his absence the presiding Associate Justice, shall preside. Whenever the Justices of the Supreme Court and the Circuit Judges meet together for the purposes aforesaid, if the number thereof qualified to sit constitute an even number, then one of the Circuit Judges must retire; and the Circuit Judges present shall determine by lot which of their number shall retire."

Petitioner submits that "the entire court" required by section twelve is that specified in section two, to-wit, a Chief Justice and four Associate Justices. There can be no doubt that this case necessarily involves serious and constitutional questions, alleged conflicts between the laws of this State and the State and Federal constitutions. Exceptions 3, 4, 5, 8. See printed argument, points II, III V.

In this connection your petitioner respectfully points out that prior to the argument of this case in the Supreme Court your petitioner

duly served upon Attorneys for Respondent herein notices of a motion, copy of which is hereto attached and made a part of this Petition, notifying respondent that in accordance with said notice appellant would move the Supreme Court to call an en banc session thereof for the hearing and determination of this case upon the ground that the Court as then and now constituted was with-
352 out jurisdiction to hear and determine this cause and the questions therein raised.

Furthermore, prior to the calling of the above entitled case for argument in the Supreme Court, said Notice of Motion and points and authorities in support thereof were duly filed with the Clerk of said Court, and your petitioner appeared before the Court and submitted argument in support of said motion.

And your petitioner further points out that upon hearing said motion the court, through the Chief Justice, announced that the motion could not be determined until the Court should come to a consideration of the case on its merits. Petitioner respectfully submits that the Court has overlooked a decision of said motion although the points, or some of them, herein raised were likewise raised on said motion, were distinctly made and stated and arose fairly upon the record, and should have been decided in accordance with section 8 of Article V of the Constitution of South Carolina 1895.

With reference to subdivision (B) of ground I above, the Constitution of South Carolina 1895 in Section 6 of Art. V provides:

"Sec. 6. Disqualification of Judges in Certain Cases—How Vacancies Filled—Holding Circuit Courts.—No Judge shall preside at the trial of any cause in the event of which he may be interested, or when either of the parties shall be connected with him by affinity or consanguinity, within such degree as may be prescribed by law, or in which he may have been counsel or have presided in any inferior Court. In case all or any of the Justices of the Supreme Court shall be thus disqualified, or be otherwise prevented from presiding in any cause or causes, the Court of the Justices thereof shall certify the same to the Governor of the State, and he shall immediately commission, specially, —

353 Second. If this petition for rehearing should be denied petitioner prays that an order be issued staying the remittitur for at least thirty days after petitioner receives notice of such denial, in order to enable petitioner to carry the case to the United States Supreme Court if it should be so advised.

All of which is respectfully submitted.

WM. ELLIOTT,
J. B. S. LYLES,
R. B. HERBERT,
W. C. McLAIN,
Appellant's Attorneys.

Certificate.

I hereby certify that I have examined the record, decision and above petition in this case and that in my opinion there is merit in the grounds on which this petition is based, and I further certify that I am not concerned in the case.

W. S. NELSON,
Attorney at Law.

Consent.

Columbia Railway, Gas & Electric Company, by F. H. Knox, President, hereby consents that the stay of remittitur herein prayed for shall be granted upon condition that the status of the property involved in the case shall not be disturbed until after the final determination of this case.

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY.
By F. H. KNOX, *President.*

Attest:
L. F. PEARCE, [SEAL.]
Secretary.

Columbia, S. C., December 1, 1921.

354 STATE OF SOUTH CAROLINA:

In the Supreme Court.

THE STATE OF SOUTH CAROLINA, Respondent,

against

COLUMBIA RAILWAY, GAS & ELECTRIC COMPANY, a Corporation Created by and under the Laws of the State of South Carolina, Appellant.

Filed 26 January, 1922.

Per Curiam:

The Petition is Dismissed. Justice Cothran was not disqualified by law and did sit at the hearing although he afterwards decided not to participate in the decision of the case. The Chief Justice was absent only a few minutes.

Under Ex Parte Dominick, 96 S. C. pg. 224, it is not necessary to fill the places of absent or disqualified Justices unless the Court so directs. Let the remittitur be stayed thirty days.

25th January, 1922.

EUGENE B. GARY, *C. J.*

A True Copy.
Attest:
HARRY McCAW,
Clerk.

355 STATE OF SOUTH CAROLINA, *ss:*

In the Supreme Court.

Authentication of Record.

I, Harry McCaw, clerk of said court, do hereby certify that the foregoing pages, numbered (in ink at the bottom of each page) from 1 to 354, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of The State of South Carolina, Respondent, vs. Columbia Railway, Gas and Electric Company, a Corporation Created by and Under the Laws of South Carolina, Appellant, and also of the opinions of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Columbia, South Carolina, this 6th day of March, 1922.

[Seal of Supreme Court of South Carolina.]

HARRY McCAW,
Clerk, Supreme Court of South Carolina.

356 STATE OF SOUTH CAROLINA:

In the Supreme Court.

THE STATE OF SOUTH CAROLINA, Respondent,

against

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, a Corporation Created by and under the Laws of South Carolina, Appellant.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court of South Carolina in rendering judgment against it in the above entitled case, the appellant hereby prays a Writ of Error, from the said decision and judgment, to the Supreme Court of the United States, and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

WM. ELLIOTT,
J. B. S. LYLES,
R. B. HERBERT,
W. C. McLAIN,
Attorneys for Appellant.

STATE OF SOUTH CAROLINA, *ss:*

In the Supreme Court.

Let the Writ of Error issue upon the execution of a bond by Columbia Railway, Gas and Electric Company to The State of South Carolina, in the sum of Ten Thousand Dollars ($10,000.00); such bond when approved to act as a supersedeas.

Dated February 18, 1922.

EUGENE B. GARY,
Chief Justice, Supreme Court of South Carolina

357 STATE OF SOUTH CAROLINA

In the Supreme Court.

THE STATE OF SOUTH CAROLINA, Respondent,

against

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, a Corporation Created by and under the Laws of South Carolina, Appellant.

Assignment of Errors and Prayer for Reversal.

Now comes Columbia Railway, Gas and Electric Company, appellant above named, defendant below, and files herewith its petition for a writ of error, and says there are errors in the records and proceedings of the above entitled case, and for the purpose of having same reviewed in the Supreme Court of the United States, makes the following assignments:

The Supreme Court of South Carolina erred in holding and deciding that the Act of the General Assembly of South Caro-
358 lina, approved March 12, 1917, and entitled "An Act to Declare That the Columbia Canal, and Its Appurtenances, and the Interest of the State in and to the Columbia Canal, Authorized to Be Transferred Under an Act Entitled 'An Act to Incorporate the Board of Trustees of the Columbia Canal, to Transfer to the Said Board the Columbia Canal, With the Lands Now Held Therewith, and Its Appurtenances, and to Develop the Same,' Approved December 24th, 1887, and Acts Supplemental or Amendatory Thereof, Shall Revert to the State by Reason of and on Account of the Violation of the Conditions Contained in Said Acts, and to Provide Provisions Relating to the Operation, Management, Control, Disposal or Sale of said Canal," and the acts of the officers of said State therein authorized and thereunder committed, were valid, when the validity of such statute and authority were denied and drawn in question by the defendant on the grounds that they were repugnant to the Constitution of the United States and in contravention thereof, in that they impaired the obligation of the contract between the defendant

and the State made by the deeds to defendant and its predecessors under the Act of the General Assembly of South Carolina, approved December 24, 1887, and entitled "An Act to Incorporate The Board of Trustees of The Columbia Canal, To Transfer To The Said Board
The Columbia Canal With The Lands Now Held There-
359 with And Its Appurtenances, And To Develop The
Same," as amended by the Act of the General Assembly of South Carolina, approved December 24, 1890, and entitled "An Act To Amend An Act Entitled 'An Act To Incorporate The Board of Trustees of the Columbia Canal, To Transfer To The Said Board The Columbia Canal, With The Lands Now Held Therewith And Its Appurtenances, And To Develop The Same,' Approved December 24th, 1887," and deprived defendant of its property without due process of law and denied to defendant the equal protection of the laws.

The said errors are more particularly set forth as follows:

First. The Supreme Court of South Carolina erred in holding and deciding that the Act of the General Assembly of South Carolina, approved March 12th, 1917, and the acts of the officers of the said State therein authorized and thereunder committed, did not impair the obligation of defendant's contract with the State of South Carolina made by the deeds to defendant and its predecessors under the Acts of the General Assembly of South Carolina of 1887 and 1890, and were not in violation of and repugnant to section ten of article one of the Constitution of the United States. (Exception 11 on first appeal).

Second. The Supreme Court of South Carolina erred in holding
and deciding that the Act of the General Assembly of South
360 Carolina of 1887, as amended by the Act of 1890, and the grants to defendant and its predecessors thereunder, did not make a contract between the State of South Carolina and the defendant, free from any conditions subsequent, express or implied, working a forfeiture, and that the Act of the General Assembly of South Carolina of 1917, and the acts of the officers of the State therein authorized and thereunder committed, did not impair the obligation of said contract in violation of section ten of article one of the Constitution of the United States. (Exceptions 1, 2, 3, 4, 7 and 14 on first appeal and exception 4 on second appeal.)

Third. The Supreme Court of South Carolina erred in holding and deciding that defendant's contract with the State under the Acts of 1887 and 1890, and the deeds to defendant and its predecessors thereunder, did not impose any obligation on the State to demand performance before the Court would adjudge a forfeiture for failure to complete the canal, as authorized and directed by the Act of 1917. (Exceptions 1*a*, 6 and 8 on second appeal.)

Fourth. The Supreme Court of South Carolina erred in holding and deciding that the Act of the General Assembly of South Carolina of 1887 required the canal to be completed down to Gervais

Street by December 24th, 1894, and thence down to the Congaree River within such time as it would take for the actual work of construction, proceeding promptly after December 24, 1894. (Exception 2 on second appeal.)

361 Fifth. The Supreme Court of South Carolina erred in holding and deciding that the undisputed evidence showed that two years was a reasonable time within which to complete the canal from Gervais Street to Rocky Branch (at the Congaree River), the lower terminus fixed by the statute, within the meaning of the Act of 1887, which required the completion of the canal "as soon as is practicable". (Exceptions 1*c*, 1*g*, 1*h*, 1*i* and 2 on second appeal.)

Sixth. The Court of Common Pleas having erroneously given force and effect to the Act of 1917 as a legislative construction of the Act of 1887 and as a legislative declaration of forfeiture of defendant's property and contract rights, the Supreme Court of South Carolina erred in holding and deciding that said Act of 1917 so construed and applied did not impair the obligation of defendant's contract with the State. (Exception 3c on second appeal.)

Seventh. The Supreme Court of South Carolina erred in holding and deciding that because of the Act of 1917 it had no power to waive the conditions in defendant's contract with the State and that such contract was not subject to the ordinary law as to waiver of conditions applicable to all contracts, and thereby gave force and effect to the Act of 1917 as a law impairing the obligation of defendant's contract with the State.

362 Eighth. The entire evidence having established without dispute that plaintiff had stood by and received substantial benefits under the contract over a long period of years, the defendant being in default, if at all, only as to a portion of its obligation or obligations, and that defendant had for many years made reasonable and substantial efforts to adjust that portion as to which it is now alleged it was in default, and that conditions had so changed since 1887 as to render completion of the canal useless for water-power and navigation purposes, and that plaintiff had not made any demand for performance on defendant, but had stood by and received benefits, knowing that defendant and its predecessor were expending large sums of money in improvements on the property, the Supreme Court of South Carolina should have held and decided that a court would not adjudge a forfeiture under such circumstances. (Exceptions 1*b*, 1*c*, 1*g* 1*j* and 9 on second appeal.)

Ninth. The Court of Common Pleas having construed the Act of 1887, under the evidence, as requiring the completion of the canal not later than the year 1896 (or at latest, 1900), the Supreme Court of South Carolina should have ruled and decided that plaintiff, by her long acquiescence and continuous receipt of benefits under the contract, for many years after the date upon which the Court of Common Pleas held that the condition had been broken, by her uncer-

363 tainty as to her own desires, by standing by and seeing improvements and additions made to the property without warning or assertion of her own title, by her failure to reject positively defendant's repeated substantial offers of compromise, by her whole course of action under all the circumstances, placed herself in a position where she could not, in the year 1917, take snap judgment of forfeiture against defendant, without any demand for completion and without giving defendant further time to complete. (Exception 9 on second appeal.)

Tenth. The undisputed evidence having established that defendant made a bona fide offer to complete the canal as soon as the contract was construed by the court to require completion, the Supreme Court of South Carolina erred in holding and deciding that under defendant's contract with the State there could be no extension of time of forfeiture because the State, a party to said contract, had by the Act of 1917 allowed but ninety days to defendant "to make 'arrangements' or agreements' for its completion". (Exception 1*d* on second appeal.)

Eleventh. The Supreme Court of South Carolina erred in holding and deciding that the Act of the General Assembly of South Carolina, approved March 12, 1917, and the acts of the officers of said State therein authorized and thereunder committed, did not deprive defendant of its property without due process of law and
361 deny to defendant the equal protection of the laws, in violation of the fourteenth amendment to the Constitution of the United States. (Exceptions 12 and 14 on first appeal and 5 on second appeal.)

Twelfth. The Court of Common Pleas having erred in construing the Act of 1917 to be a legislative construction of the Act of 1887 and having construed and given weight and effect to the Act of 1917 as a legislative declaration and enactment of forfeiture of the property and contract rights of defendant, the Supreme Court of South Carolina erred in holding and deciding that said Act of 1917 did not deprive defendant of its property without due process of law and did not deny to defendant the equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United States. (Exception 3*b* on second appeal.)

Thirteenth. The Supreme Court of South Carolina erred in holding and deciding that this suit was not one arising under the Constitution of the United States, and that defendant was not entitled to remove the same into the District Court of the United States for the Eastern District of South Carolina. (Exception 15 on first appeal.)

Fourteenth. The defendant-appellant having duly filed and made its motion in the Supreme Court of South Carolina that said court call to its assistance all of the Judges of the Circuit Court, pursuant to the provisions of section twelve of article five of the Constitution of South Carolina of 1895, the Supreme Court of South Caro-
365 lina erred in failing and refusing to grant said motion and in so doing and failing to do deprived defendant of its prop-

erty without due process of law and denied to defendant the equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United States.

For which errors the defendant, Columbia Railway, Gas and Electric Company, prays that the said judgment of the Supreme Court of South Carolina, dated January 25th, 1922, be reversed and a judgment rendered in favor of said defendant and for costs.

WM. ELLIOTT,
J. B. S. LYLES,
R. B. HERBERT,
W. C. McLAIN,
Attorneys for Columbia Railway, Gas and Electric Company.

365½ [Endorsed:] Original. State of South Carolina in the Supreme Court. The State of South Carolina, Respondent, against Columbia Railway, Gas and Electric Company, a corporation created by and under the laws of South Carolina, Appellant. Petition for Writ of Error, Assignment of Errors and Prayer for Reversal. Supreme Court of South Carolina, Clerk's Office, Columbia, S. C. Filed Feb. 20, 1922. Harry McCaw, Clerk.

366 STATE OF SOUTH CAROLINA:

In the Supreme Court.

THE STATE OF SOUTH CAROLINA, Defendant in Error.

against

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, a Corporation Created by and under the Laws of South Carolina, Plaintiff in Error.

Bond.

Know all men by these presents, That we, Columbia Railway, Gas and Electric Company, a corporation created by and under the laws of South Carolina, as principal, and American Surety Company of New York, a corporation licensed to do business in South Carolina, as surety, are held and firmly bound unto The State of South Carolina, in the sum of Ten Thousand Dollars ($10,000.00), to be paid to the said State, to which payment well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 14th day of February, 1922.

Whereas, the above named Plaintiff in Error seeks to prose-
367 cute its Writ of Error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of South Carolina;

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said Writ of Error to effect, and answer all costs and damages that may be adjudged if

it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY,
By EDWIN W. ROBERTSON,
Its Treasurer.

Attest:
L. F. PEARCE,
Secretary.

AUGUST KOHN,
KATHARINE D. GOODWYN,
As to Columbia Railway, Gas and Electric Company.

AMERICAN SURETY COMPANY OF NEW YORK,
By R. B. HERBERT,
Resident Vice-President.
DAVID G. ELLISON,
Resident Assistant Secretary.

E. B. HODGE,
BELLE CRAWFORD,
As to American Surety Company of New York.

STATE OF SOUTH CAROLINA,
County of Richland.

Personally appears Katharine D. Goodwyn who on oath says that she saw Columbia Railway, Gas and Electric Company, by Edwin W. Robertson, its Treasurer, sign, seal and as its act and deed deliver the above obligation for the uses and purposes therein men-
368 tioned and that she with August Kohn witnessed the execution thereof.

KATHARINE D. GOODWYN.

Sworn to before me this 11th day of February, 1922.
G. P. MILLER. [L. S.]
Notary Public for South Carolina.

STATE OF SOUTH CAROLINA,
County of Richland:

Personally appears Belle Crawford who on oath says that she saw American Surety Company of New York, by R. B. Herbert, its Resident Vice-President and D. G. Ellison, its Resident Assistant Secretary, sign, seal, and as its act and deed deliver the above obligation for the uses and purposes therein mentioned and that she with E. B. Hodge witnessed the execution thereof.

BELLE CRAWFORD.

Sworn to before me this 11th day of February, 1922.
G. C. MOTTE. [L. S.]
Notary Public for South Carolina.

Bond approved, and to operate as a supersedeas.
Dated February 18th, 1922.

EUGENE B. GARY,
Chief Justice Supreme Court of South Carolina.

A true copy.

Attest:

[Seal of the Supreme Court of South Carolina.]

HARRY McCAW,
Clerk.

368½ [Endorsed:] Copy. State of South Carolina. In the Supreme Court. Bond on Writ of Error in the State of South Carolina, Respondent, vs. Columbia Railway, Gas and Electric Company, a corporation created by and under the laws of South Carolina, Appellant. Supreme Court of South Carolina. Clerk's Office, Columbia, S. C. Filed Feb. 20, 1922. Harry McCaw, Clerk.

369 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of South Carolina and Columbia Railway, Gas and Electric Company, a corporation created by and under the laws of South Carolina, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened, to the great damage of the said Columbia Railway, Gas and Electric Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid,
370 with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 13th day of February, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal of the United States District Court, Eastern District So. Ca.]

RICH. W. HUTSON,
Clerk District Court United States for the Eastern District of South Carolina.

Allowed, February 18th, 1922.
EUGENE B. GARY,
Chief Justice Supreme Court of South Carolina.

370½ [Endorsed:] Original. United States of America. Writ of Error to the Judges of the Supreme Court of South Carolina in the Suit Between The State of South Carolina and Columbia Railway, Gas and Electric Company, a corporation created by and under the laws of South Carolina.

371 STATE OF SOUTH CAROLINA:

In the Supreme Court.

I, Harry McCaw, Clerk of the said Court, do hereby certify that there was lodged with me, as such clerk, on 20th day of February, 1922, in the matter of Columbia Railway, Gas and Electric Company, a corporation created by and under the laws of South Carolina vs. The State of South Carolina:

1. The original bond, of which a copy is herewith set forth.

2. Two copies of the Writ of Error, as herein set forth, one for the defendant in error and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in Columbia, S. C., this 20th day of February, 1922.

[Seal of the Supreme Court of South Carolina.]

HARRY McCAW,
Clerk Supreme Court of South Carolina.

372 *Citation.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the State of South Carolina, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a Writ of Error

filed in the office of the Clerk of the Supreme Court of the State of South Carolina, wherein Columbia Railway, Gas and Electric Company, a corporation created by and under the laws of South Carolina, is plaintiff in error and you are defendant in error, to show cause, if any there by, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of South Carolina, this 18 day of February, 1922.

EUGENE B. GARY,
Chief Justice Supreme Court of South Carolina.

Attest: February 20, 1922.

[Seal of the Supreme Court of South Carolina.]

HARRY McCAW,
Clerk Supreme Court of South Carolina.

I, Attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States this 20th day of February, 1922.

SAM. M. WOLFE,
Attorney General,
Attorney for the State of South Carolina.

372½ [Endorsed:] Original. United States of America, Supreme Court of the United States. Columbia Railway, Gas and Electric Company, a corporation created by and under the laws of South Carolina, Plaintiff in Error, vs. The State of South Carolina, Defendant in Error. Citation. Supreme Court of South Carolina, Clerk's Office, Columbia, S. C. Filed Feb. 20, 1922. Harry McCaw, Clerk.

373 *Return to Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

Supreme Court of South Carolina.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the case in which in the Supreme Court of South Carolina The State of South Carolina was respondent and Columbia Railway, Gas and Electric Company, a Corporation Created by and Under the Laws of South Carolina, was appellant, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of South Carolina, in the city of Columbia, this March 6th, 1922.

[Seal of the Supreme Court of South Carolina.]

HARRY McCAW,
Clerk Supreme Court of South Carolina.

Costs of Suit.

Appellant's costs on first appeal $58.00, paid by appellant.
Appellant's costs on second appeal $465.00, paid by appellant.
Costs of transcript $10.00, paid by appellant.

HARRY McCAW,
Clerk.

373½ [Endorsed:] Original. United States of America in the Supreme Court of the United States. Columbia Railway, Gas and Electric Company, a Corporation Created by and Under the Laws of South Carolina, Plaintiff in Error vs. The State of South Carolina, Defendant in Error. Certificate of Lodgment, Authentication of Record, Return to Writ of Error, Præcipe of Plaintiff in Error.

374 UNITED STATES OF AMERICA:

In the Supreme Court.

COLUMBIA RAILWAY GAS & ELECTRIC COMPANY, Plaintiff in Error,

against

THE STATE OF SOUTH CAROLINA, Defendant in Error.

To the Clerk of the Supreme Court of South Carolina:

The plaintiff in error indicates the following as the portions of the record to be incorporated into the transcript of the record on the writ of error in this case:

1. The entire printed record in the first appeal, pages 1 to 47 inclusive.

2. The notice of motion for an en banc session dated April 7th, 1921.

3. Pages 1 to 288 of the printed record on the second appeal, excluding pages 289 to 295 inclusive.

4. The first opinion and judgment of the Supreme Court, dated August 26th, 1919.

5. The second opinion and judgment of the Supreme Court, filed November 26th, 1921.

6. The petition for rehearing filed December —, 1921, and the order of the Court thereon.

7. The opinion and order of the Supreme Court refusing the petition for rehearing dated January 25th, 1922 and filed January 26th, 1922.

8. The Clerk's certificate authenticating the record.

9. The original petition for writ of error, the order of allowance, the original assignments of error with the prayer for reversal.

375 10. A copy of the bond with the order approving same.

11. The original writ of error with the allowance thereof

12. Certificate of lodgement.

13. The original citation with acknowledgment of service.

14. The return to writ of error and statement of costs.

WM. ELLIOTT,
J. B. S. LYLES,
R. B. HERBERT,
W. C. McLAIN,
Attorneys for Plaintiff in Error.

Service acknowledged and copy received this 21st day of February, 1922.

SAM. M. WOLFE,
Attorney General,
Attorney of Record for Defendant in Error.

Supreme Court of South Carolina, Clerk's Office, Columbia, S. C. Filed Feb. 21, 1922. Harry McCaw, Clerk.

[Endorsed:] Supreme Court of South Carolina, Clerk's Office, Columbia, S. C. Filed Feb. 21, 1922. Harry McCaw, Clerk.

Endorsed on cover: File No. 28755. South Carolina Supreme Court. Term No. 800. Columbia Railway, Gas and Electric Company, plaintiff in error, vs. The State of South Carolina. Filed March 8th, 1922. File No. 28755.

Office Supreme Court U.S.
FILED
OCT 6 1922
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 297

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR.

J. B. S. LYLES,
R. B. HERBERT,
W. C. McLAIN,
Attorneys for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. ~~800~~. 297

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR.

Preliminary Statement.

This writ of error brings up a final judgment of the Supreme Court of South Carolina in a case where (in the trial court) the State of South Carolina was plaintiff and the Columbia Railway, Gas and Electric Company was defend-

ant. The parties are referred to according to their designation and position in the trial court.

The disposition of the case involves consideration of numerous statutes of South Carolina, and all of these referred to are printed as an appendage to this brief, under the heading "Statutes of South Carolina Referred to in Brief."

Statement.

This action was commenced in the Court of Common Pleas for Richland County, South Carolina, by service of a summons and complaint on December 11, 1917. The "action is brought in the name of the State of South Carolina by the State officers constituting the Canal Commission, by virtue of the authority, directions, and declaration of forfeiture contained in the Act of 1917 (*infra*, page 95), to recover possession of the property known as the Columbia Canal, together with damages for defendant's withholding of same, because of the failure and neglect of the Columbia Water Power Company and its assignee, the defendant, to fulfill the conditions contained in the acts of 1887 and 1890 (*infra*, pages 80, 83), and conveyances thereunder" (quoted from Record, page 31). (A summary of the complaint and answer upon which the case went to trial is contained at pages 32-41 of the record.)

The canal property being then vested in a former Canal Commission of the State, the Act of February 9, 1882 (see page 66, *infra*), directed this Commission to convey the property to the board of directors of the S. C. penitentiary, and this was accordingly done.

The Act of December 24, 1887, created and incorporated

the board of trustees of the Columbia Canal and required the board of directors, *supra*, to convey the property to them. (See page 70, *infra*.) The canal had not then been constructed at all, according to the dimensions therein specified; there was only the remains of an older and smaller canal following somewhat the course proposed for the new one.

The important requirements of the Act of 1887, the violations of which are alleged in the complaint as grounds for forfeiture, were (*a*) that the canal as constructed should be of certain dimensions and develop ten thousand horse power at the south side of Gervais Street (section 3), (*b*) that it should be kept open for navigation free of charge (section 5), and (*c*), that the board of trustees "shall, as soon as is practicable, complete the canal down to Congaree River" (section 7). Failure to comply with these three (alleged) conditions were stated as the grounds of forfeiture in the State's complaint—the former two were abandoned on the trial and the forfeiture adjudged on the last one. (See pages 203-207 of Record.) This act is referred to as the "Act of 1887."

The Board of Directors of the penitentiary duly executed their deed to the Board of Trustees of the canal. (See Exhibit 4, page 134 of Record.)

There was a second Act of December 24, 1887, which authorized the city of Columbia to guarantee the coupons on the bonds to be issued by the Board of Trustees of the canal under the statute last above mentioned. (See page 80, *infra*.) The few references to this statute will be made to it as the "second Act of 1887."

The Act of 1887 was amended on December 24, 1890, so as to authorize the board of trustees to sell the property

"subject, however, to all the duties and liabilities imposed thereby (by the Act of 1887), and subject to all contracts, liabilities and obligations made and entered into by said board (of trustees) prior to such sale and transfer. * * *" (See page 70, *infra.*) It is important to note that this statutory authority to sell (under which defendant and its predecessor purchased) was not made subject to any "conditions." The word "condition" is not used in section 23 of the Act of 1887 as amended by section 2 of the Act of 1890. This is the section authorizing the sale.

On July 14, 1891, one George Wallace made to the Board of Trustees of the Canal a proposition to purchase the property (quoted in Exhibit 5, at pages 135-136 of the Record), which was accepted. This agreement was assigned to the Columbia Water Power Company and the board of trustees executed their deed to that company in January, 1892. (Exhibit 5, page 135, Transcript.)

The State (its agents and assignee) has received the benefit of the following cash, or its equivalent, as its consideration from this contract, from 1892 down to the forfeiture in 1917:

The assumption of the principal of the $200,000 of canal bonds	$200,000.
The payment of the 6 per cent interest on the same from 1892 to the maturity—$100,000 matured in 1918 and $100,000 in 1919—more than	300,000.
A cash payment of	60,000.
Since the completion of the canal to Gervais Street on December 11, 1891, pursuant to section 7 of the Act of 1887, the State has received 500 horse power of water power for itself,	

500 for its assignee, Sullivan Fenner, and 500 (increased to 600 under the proposition of George Wallace), for its agent, the city of Columbia—a total of 1,500—for more than twenty-five years up to 1917. Section 16 of the Act of 1887 fixes a minimum value of $5.00 per horse power per annum (this was a very low value, as the court knows and the testimony shows)—so the money value (1,500 x $5.00 x 25) received in this water power exceeds..... 187,500.

Making the actual cash, or its equivalent, that the State and its agents has received during this period—from the deed of 1892 to the forfeiture in 1917—exceed ..... 747,500.
Also State taxes amounting to a substantial sum.

The new canal (the one involved here) was constructed from Gervais Street northward to Bull's Sluice. This work was started by Major Lee in 1885, under the board of directors of the penitentiary (see p. 81) and later completed (that is, the portion northward from Gervais Street to Bull's Sluice) by Byron Holly, as chief engineer to the board of trustees under the Act of 1887. His certificate of completion to Gervais Street was a condition of the proposition of George Wallace (R., p. 136) and is recited in the deed to Columbia Water Power Company (Exhibit 5, at R., p. 137).

The canal was never completed—that is, extended—to the Congaree River, near Rocky Branch, by either defendant or its predecessor, because it has never become practicable to complete it, for either navigation or water-power purposes, and apparently the State has cared nothing about its completion until this unexpected forfeiture of 1917.

The State has clearly received all the direct and indirect benefits from development of water power that it ever anticipated. It and its agents and assignee have received the 1,500 horse power since 1892, and the State and her citizens have received the full indirect benefit of the development of th 10,000 horse power at Gervais Street. This is the only measure of the total amount expected to be developed from the canal (section 3 of Act of 1887), and both sides agree that the canal as completed to Gervais Street is larger than required by the act and develops more than this amount (Ludlow, pages 55, 57, 59; Shand, pages 105-106). The Legislature contemplated the extension to Rocky Branch not to develop power but to use the 10,000 horse power of water power to be developed down as far as Gervais Street. The Legislature then thought it necessary to place the factories between the canal and river—so the water could pass from the canal through the water wheels and into the river—as this was the only method of using power then known; and the topography of the ground between the canal and river above Gervais Street was not suitable for factories. But since that time the method of hydraulic development and electric transmission has come into use, so that all the power can be developed by one plant on the canal and transmitted to factories at various points elsewhere (Ludlow, pages 57-58; Lee, page 81; Shand, pages 104-110). And the extension of the canal has never been practicable from a power standpoint (Crane, page 111; Shand, pages 106, 107; Lukesh, page 64).

The testimony also shows that the extension has never been practicable to promote navigation, there being none to promote. The navigation of Broad River is a chimerical

dream (Lukesh, page 66; Kind, page 102; Spence, page 115; Lightsey, page 115; Gibbes, page 193). The State has never even provided a keeper for the locks (McMaster, page 70; Kind, page 102). Navigation of the Congaree River has stagnated and died, not because the canal was not extended to Rocky Branch, but because of the inexorable economic and physical laws governing navigation on such a stream (Shand, pages 107-109; Crane, pages 111-112; Nesmith, page 114; Baker, pages 115-117; Otis, pages 125-126; Gibbes, pages 190-194; Lukesh, pages 65-66; Chitwood, pages 76-77).

The Columbia Water Power Company took possession of the property under the deed of January, 1892, and (according to the allegations of section 8 of the complaint, admitted by the answer; Record, page 34) proceeded "to utilize and use the same in accordance with the terms and provisions of said acts, and to construct a power-house and to sell power generated from the canal to manufacturing interests in and around Columbia, and to keep open for navigation, free of charge, said canal, down to Gervais Street, as prescribed by section 5 of the Act of 1887," until it sold same to defendant by its deed of July 1, 1905. (See Exhibit 6, Record, page 139.)

During this period of 13 years the State rested quietly. The canal was not extended, there being no reason for the extension, since it would do no good either to develop power or to promote navigation. The State calmly and quietly received the substantial benefits under the contract and did not raise its voice to suggest that completion was still desirable or expected. There was no agitation of the matter before or by the Legislature during this long period. The only legislative consideration touching the subject-matter

was the Act of 1892 (*infra*, 86) ratifying a contract between the penitentiary and defendant for the development of the 500 horse power to be furnished the State (by the Columbia Water Power Company) for the use of the penitentiary. This act, by the way, resulted in litigation which came to this court. See Columbia Water Power Company *v.* Columbia Electric Street Railway, Light and Power Company (plaintiff in error under its former name), 172 U. S., 475; 43 L. Ed., 521, *infra*. This act had no relation to the question of completion.

The next appearance of this matter in the legislative journals is in the year 1910, but before that time the evidence shows the development to which we now refer.

Prior to 1902 the Federal Government had projected the improvement of the navigation of the Congaree River, including the question of getting boats up to the city of Columbia over the shoals opposite the southern edge of the city (and north of Rocky Branch). This latter question was solved by the plan adopted by the Federal Government to build a lock and dam in the river below Gervais Street (at a point which was seven hundred to one thousand feet north of Rocky Branch). This lock and dam was built in 1902, but was washed away in 1905, at which time "the Columbia Canal was considered as a possibility, and it was decided (by the Federal Government) to go ahead with the reconstruction of the dam instead" (Colonel Lukesh, pages 49-53). The reconstruction was accordingly started and the lock and dam finally completed and ready for use in December, 1915, just thirteen months before the forfeiture act of 1917. The project has cost the Government about $500,000. The Government engineering board recommended only that the canal

be extended into the Government pool (at Gervais Street), above the Government dam, not that the canal be extended all the way, parallel to the government pool, and into the river at Rocky Branch, below the Government dam (page 54).

The present Canal Commission reported to the Legislature in 1918: "It was at one time supposed that for navigation purposes it would not be necessary or expedient to extend the canal throughout its entire length to Rocky Branch, * * *" Ex-Lieutenant Governor Junius T. Liles, then chairman of the Ways and Means Committee of the House and *ex officio* a member and secretary of the Canal Commission under the Act of 1917, says that this report was compiled after due discussion and consideration, so he fixes it as the "supposition" of the Canal Commission. Mr. Liles further states, on examination by counsel for the State: "I assume that as long as the Legislature of South Carolina thought the Government would make a feasible and adequate way, there was no need for another way" (pages 44-46).

Hon. Neils Christensen, a member of the State Senate since 1905, and, as chairman of the Finance Committee, *ex officio* a member of the Canal Commission of 1917, also a witness for the State, testified that the supposition that for navigation purposes it was not necessary or expedient to extend the canal to Rocky Branch was held by the Legislature before the creation of the Canal Commission in 1917 and was the result of the statement of defendant's attorneys to legislative committees that defendant felt it was not necessary to exend the canal pending completion of the Government's project, which might be sufficient for improved navigation without

using the canal; that members of the legislative committee went to Charleston and discussed the governmental project with the chief engineer of the United States, and this "was the source of the supposition that for navigation purposes it would not be necessary to extend the canal" (pages 65-68).

Senator Christensen further testified that he had, as a member of legislative committees for a number of years, been present a good many times when defendant's representatives appeared about this canal matter; that they never denied liability to extend; "their proposals were along the line that the Government was doing something and to wait awhile and see if that would not answer the purpose and let them off from the completion of the canal." "The defendant's proposition was when the Government work was completed to join up the completed part of the canal with the Government work by extending the canal through Gervais Street" instead of building the canal down to Rocky Branch.

Mr. Thornwell McMaster first reported to the Judiciary Committee of the Legislature in January, 1909, that defendant was not carrying out its canal contract. He frequently attended committee hearings after that. Defendant's attorneys never denied the obligation to extend, "but were trying to put something in lieu thereof." Their first proposition was to cut the canal into the Government pool. In 1911 they proposed to run an electric line from Columbia down to old Granby Landing, 600 feet south of Rocky Branch, where the river boats landed to bring up the freight; their third proposition was to dam both Saluda and Broad rivers and dig the canal on down (pages 68-70).

LEGISLATIVE RECORD.

In 1910 the Dixon concurrent resolution was introduced, whereby it was resolved, first, that it was to the interest of the State that the canal be completed, etc., and, second, that the Governor be requested to investigate into the advisability of requiring the completion of the canal and report back at the next session. (See Exhibit 50-D, page 197.) This resolution was referred to the Judiciary Committee, whose report, which was adopted by the House, struck out the first resolving paragraph (which declared that it was to the interest of the State to have the canal completed) and left it merely as a resolution calling upon the Governor to investigate this question and report back to the next session of the Legislature. The resolution as thus amended was adopted by the House and concurred in by the Senate. (See page 199.)

In the same year, 1910, the Graydon concurrent resolution (Exhibit 50-E, page 199) was introduced in the Senate, wherein, after a number of recitals, it was resolved that the Governor be requested to investigate into the advisability of requiring the completion of the canal and report back. The resolution never contained a resolving clause to the effect that it was to the interest of the State to have the canal completed. The resolution was concurred in by the House.

The Johnson concurrent resolution of 1911 (Exhibit 50-F, page 200): We call attention, as pointed out by Mr. Liles when this resolution was offered in evidence (page 134), that this Johnson concurrent resolution of 1911 evidently purported to quote as a recital the Dixon concurrent resolution of 1910, because the latter became effective Feb-

ruary 16, 1910, but the Johnson resolution was in error in quoting the Dixon resolution as containing the first resolving clause, "That it is to the interest of the State that said canal be completed to the Congaree River, etc."—when this resolving clause was struck out of the Dixon resolution before the same was adopted. However, the only resolving clause in the Johnson resolution was that the Governor's attention be directed to the former resolution, and that he be requested to take such final action therein as would best subserve the interest of the State (page 201).

Defendant objected to these concurrent resolutions of 1910 and 1911, when offered by the State, upon the grounds that they did not have the force of law and could not amount to a demand, and, further, that their language did not amount to a demand (page 133). The most that they can be construed to show is that the Legislature did not then know itself wherein lay the best interests of the State on the question of the completion of the canal. The Legislature was not then demanding completion because, as pointed out by Senator Christensen and Governor Liles, it was not then known what the result of the Government project would be and whether the extension of the canal would be necessary to promote navigation.

In 1912 an act was passed authorizing defendant to construct and maintain a dam across the Congaree River at Columbia, and particular attention is requested to section 6 of that act (*infra*, 89). By that section it was provided that if defendant should accept the privilege of the act it should be deemed to have contracted to complete the canal within a time to be fixed by a court, and then, failing so to complete, that it should pay to the State such sum in lieu

of completion as might be fixed by a court. This Act of 1912 shows the still indefinite attitude of the General Assembly on the question of completion. It shows that the Legislature then thought that the proper amount of money might compensate the State in lieu of completion.

In the litigation, extending from 1908 to 1911 (State of S. C. *v.* Columbia Water Power Co. *et al.*, *infra*), in which the State sought to have the canal as completed to Gervais Street kept open for navigation, no claim whatsoever was advanced or pressed to have the canal extended to Rocky Branch. And although the State succeeded in securing an injunction against the continuance of the pipe bridge of the city of Columbia across the canal, the legislative opinion was very strong against requiring the removal of this bridge.

This was shown first by the concurrent resolution of 1911 giving the city an extension of five years (*infra*, p. 87), and when the court held this to be ineffective, then the Legislature passed the Act of 1914 (*infra*, p. 94), wherein the city was permitted to maintain the bridge until "construction work for the completion of said canal be actually begun." This conclusively shows that in 1911 the Legislature did not object to the obstruction continuing for five years, and in 1914 it looked upon the completion as something in the indefinite future.

In 1913 the Welch and Weston bills were introduced (Exhibit 50-G, page 201). These bills provided that if defendant should build the railroad line mentioned by Mr. McMaster that it should be relieved from any obligation to complete the canal. The bills were not passed, again showing the indefinite attitude of the Legislature on this question.

In 1914 the Wyche joint resolution was introduced (Ex-

hibit 50-A, page 195). It was referred to the Judiciary Committee and received a majority favorable and minority unfavorable report, but no further action was taken on it. Particular attention is due this resolution because it was a demand for completion. And so a demand for performance was introduced in the Legislature in the year 1914, received a divided committee report, was considered, and failed to pass.

In 1915 the Etheredge concurrent resolution was introduced in the House, but later tabled and withdrawn (Exhibit 50-H, page 202). This referred the matter to the Attorney General to make an examination and to take the necessary steps to protect the interests of the State and to report back the result of his investigation with his recommendations.

In 1916 the La Grone concurrent resolution was introduced in the House, adopted, and sent to the Senate, but not concurred in (Exhibit 50-H, page 203). This resolution directed the Attorney General to institute legal proceedings to enforce the rights of the State in the canal and required him to report back to the Legislature. It thus appears that the matter continued in the same indefinite status, so far as concerns even legislative opinion, up through 1916.

In 1917 the Mauldin resolution was introduced in the House and the Ketchen resolution in the Senate, but neither were adopted, and as the act under which this suit was brought was passed in 1917 they are not important (Exhibits 50 B and C, page 197).

We have pointed out that during the period commencing prior to the conveyance to the Columbia Water Power Company in 1892, and extending beyond its conveyance to defendant in 1905, the Legislature did nothing to show any

desire whatsoever on its part to have the canal completed. It merely sat still and received the continuous and substantial benefits the Water Power Company paid it pursuant to the grant during this period, permitting that company to spend hundreds of thousands of dollars in developing and improving the property, as it then stood completed to Gervais Street. And this was the status when defendant purchased the property in 1905. As we have shown, the matter did not receive any attention whatsoever from the Legislature until 1910—five years after defendant's purchase. And from then to 1917, there was not only no demand made upon the defendant for completion, but the Legislature itself clearly indicated its own lack of conviction that completion was even desirable. So the defendant succeeded to the status of the Water Power Company and continued in that status until 1917—all this additional period of twelve years—a total of twenty-five—the State calmly sitting still and receiving the continuous and substantial benefits under the deed, year by year, allowing defendant to continue to improve and develop the property. The evidence shows that defendant spent thousands of dollars to repair the damages done the canal banks by the floods of 1908 and 1916, and has always kept the property in good operating condition (Wallace, page 99; Shand, pages 104-106; Crane, page 110). The State knew of the improvements made on the canal because section 2 of the Act of 1917 seeks to forfeit "the improvements placed thereon by those in possession."

Defendant has always considered it entirely impracticable to complete the canal, both from a water power and navigation standpoint, and has always frankly stated to the Legis-

lature its honest convictions in the premises. But the record shows that no demand has ever been made, and it is quite clear, therefore, it has never declined to complete on demand.

Defendant construed section 5 of the forfeiture act of 1917 as authorizing the Canal Commission to compromise this matter with the defendant. Thereupon, on April 25, 1917, when defendant was notified that the Commission was ready to receive a proposition from it (Exhibits 8-A, 8-B, 8-C, pages 141-144) defendant first made an offer to pay fifty thousand dollars to settle the matter, stating that the proponents of completion had estimated the cost of completion at seventy-five thousand dollars (Exhibit 8-D, page 144).

The effect of this offer was that the State could use the money as its own for any purpose, but if it did use it to complete the canal, then the extended canal was to belong to defendant subject to the duties imposed by the Act of 1887. This offer of defendant was, on May 28, 1917, "refused *in toto*" by the Commission without comment, explanation, or suggestion (Exhibit 8-E, page 146). Defendant then wrote the Commission, on May 31, 1917, asking for a reasonable discussion of the matter or asking that the Commission indicate what proposition would meet its approval (Exhibit 8-F, page 146), but in its reply of June 4, 1917, the Commission preserved its absolute secrecy as to what kind or character of proposition it would even consider (Exhibit 8-G, page 147). But, notwithstanding this (Exhibit 8-H, page 151), defendant's attorneys made a desperate effort to ascertain what the Commission wanted or would consider by personal but uninvited appearance before the Commission on June 11, 1917 (Exhibit 8-I, page 151), and although the

Commission preserved its absolute secrecy, they increased the offer of settlement to seventy-five thousand dollars.

The defendant first demurred to the complaint (page 14), and the decision of the Supreme Court thereon, which was the first adjudication that there was an obligation to complete, was filed August 26, 1919, and the remittitur sent down September 5, 1919. On September 16, 1919, defendant wrote the Commission making an unqualified offer to complete the canal (Exhibit 8-N, page 159). The Commission replied on October 11, 1919 (Exhibit 8-O, page 160), imposing conditions on their face impossible. The defendant agreed to the conditions imposed by the Commission so far as it possibly could (Exhibit 8-P, page 166, and Exhibit 8-Q, page 169).

Manner in Which Issues Arise.

The complaint alleged, as grounds of forfeiture, breaches of various conditions alleged to be contained in the acts of 1887-1890, as follows:

(*a*) Failure to develop 10,000 horse power at the south side of Gervais Street, as required by section 3 of the Act of 1887 (paragraph 9 of complaint, R., p. 34);

(*b*) Failure to keep the canal open for navigation, as required by section 5 of the Act of 1887, by allowing the locks and water gates to become unworkable, by placing obstructions at the river's entrance into the canal, and by allowing the city of Columbia, Columbia Mills to place bridges and pipes across the canal (paragraph 9 of complaint, R., p. 34);

(*c*) Abandoning the canal for the development of water power and not keeping the dam and canal banks in repair (paragraph 10, R., p. 36);

(*d*) Failure to extend the canal to the Congaree River (paragraph 10, R., p. 36).

It will simplify matters to point out here that upon the conclusion of the trial on the merits the trial judge *sua mote* directed a verdict solely on the last ground, so that consideration of the others becomes only incidental. (See R., pp. 203-207.)

Defendant first demurred to the complaint, making the point that the acts of 1887-1890 contained no conditions subsequent working a forfeiture, together with the point that the Act of 1917 violated the contract-impairment clause and due-process clause of the Federal Constitution (R., pp. 14-16). It then endeavored to remove the case upon the ground that the conflict between the Act of 1917 and the Federal Constitution appeared from the face of the complaint and made the case one arising under the Federal Constitution within the removal statute. (See petition, R., p. 16). But the State (p. 10) and Federal court (p. 22) held otherwise, and the lower State court overruled the demurrer (p. 23). Defendant then appealed to the Supreme Court of South Carolina (pp. 25-29), which affirmed the lower court (p. 212).

The Supreme Court construed the Act of 1887 as containing an implied condition subsequent working a forfeiture if a reasonable (practicable) time had elapsed in fact, but expressly held that whether a reasonable time had in fact elapsed and that whether, under all the circumstances, the

drastic remedy of forfeiture should be adjudged, without giving further time, were open questions which would depend on the facts and circumstances developed on the trial. It pointed out that in such cases a demand and refusal to perform were requisites of a default. It explicitly held that the Act of 1917 did not undertake to adjudicate anything and did not violate the Federal Constitution (R., pp. 212-215).

Defendant then answered, denying that it had ever become practicable to complete the canal and setting up that no demand had been made for completion and that defendant had offered to complete the same. (See "Summary of Complaint and Answer," R., pp. 32-41.) By its second defense, defendant especially pleaded and set up and claimed the protection of section ten of article one and the fourteenth amendment to the Federal Constitution (pp. 40-41).

The testimony already referred to was developed on a trial lasting eight days (p. 32), and then, after allowing five hours of argument to the jury, the trial judge *sua mote* directed a verdict in favor of the State for the property in dispute (pp. 204-207). He ruled as follows:

That the Act of 1917 recites that notwithstanding the lapse of time from 1887 that the Board of Trustees and assigns have failed to perform the conditions of the Act of 1887;

That the Act of 1917 enacts that the conditions of the Act of 1887 have been disregarded and the right of defendant to the property forfeited;

That the Act of 1887 required the canal to be completed to Gervais Street by December 24, 1894, and thence to the Congaree River within such time thereafter as would be required for the actual physical construction work, starting and acting promptly (he said this was shown by the testi-

mony to be from 1½ to 4, or possibly 6 years), but that over 20 years (from December, 1894, to March, 1917) had elapsed;

That the declaration of the Act of 1917 that there had been a breach of the conditions of the Act of 1887 "was entitled to some respect," and that the Act of 1917 was "binding on the court under the evidence."

It is clear that he gave force and effect to the legislative declaration and legislative adjudication of forfeiture contained in the Act of 1917.

Before directing this verdict the trial judge had overruled defendant's motion for a nonsuit (p. 104) and a directed verdict in its favor (p. 203) upon the written grounds "which are correctly quoted in" exceptions 4, 5, 6, 7, 8 and 9 (pp. 210-211).

The Supreme Court of South Carolina affirmed the judgment below in an opinion that will be further discussed in the argument.

Specification of Errors.

Jurisdiction of This Court.

AUTHORITIES CITED.

Andrews *v.* R. Co., 248 U. S., 272; 63 L. Ed., 236.

Atlantic & Pacific Ry. *v.* Mingus, 165 U. S., 413; 41 L. Ed., 770.

Bank of Minden *v.* Clement, 256 U. S., 126; 65 L. Ed., 857.

Chicago G. W. R. Co. *v.* Basham, 249 U. S. 164; 63 L. Ed., 534.

Citizens Bank, etc., *v.* Opperman, 249 U. S., 448; 63 L. Ed., 701.

Coe *v.* Armour Fertilizer Works, 237 U. S., 413; 59 L. Ed., 1027.

Columbia Water Power Co. *v.* Campbell, 75 S. C., 34.

Columbia Water Power Co. *v.* Columbia Electric Street Railway, Light & Power Company, 172 U. S., 475; 43 L. Ed., 521.

Dahne-Walker Milling Co. *v.* Bondurant, decided Decem-12, 1921, page 114 of advance sheet No. 5 of 66 L. Ed.

Detroit United Railway *v.* Michigan, 242 U. S., 238; 61 L. Ed., 268.

Eureka Pipe Line Co. *v.* Hallanhan, decided December 12, 1921, page 127 of advance sheet No. 5 of 66 L. Ed.

Gelpcke *v.* Dubuque, 68 U. S. (1 Wall.), 222; 17 L. Ed., 519.

Green *v.* Biddle, 8 Wheat., 1; 5 L. Ed., 547.

Kansas City S. R. Co. *v.* Road Improvement Dist. No. 6, 256 U. S., 658; 65 L. Ed., 1151.

Kenney *v.* Loyal Order of Moose, 252 U. S., 411; 64 L. Ed., 638.

Merchants National Bank *v.* Richmond, 256 U. S., 635; 65 L. Ed., 1135.

Messenger *v.* Anderson, 225 U. S., 436; 56 L. Ed., 1152.

Muhlker *v.* N. Y. & H. R. Co., 197 U. S., 544; 49 L. Ed., 872.

New Orleans, etc., R. Co. *v.* Scarlet, 249 U. S., 528; 63 L. Ed., 752.

United Fuel Gas Co. *v.* Hallanhan, decided December 12, 1921, page 130 of advance sheet No. 5 of 66 L. Ed.

Yazoo, etc., R. Co. *v.* Mullins, 249 U. S., 531; 63 L. Ed., 754.

First Specification: Impairing Defendant's Contract and Depriving Defendant of Due Process of Law by Giving Force and Effect to the Act of 1917 as a Legislative Adjudication of Forfeiture.

SIXTH, ELEVENTH, AND TWELFTH ASSIGNMENTS OF ERROR.

AUTHORITIES CITED.

Carondelet Canal, etc., Co. *v.* Louisiana, 233 U. S., 362; 58 L. Ed., 1001; 18 C. J., 429.

McGahey *v.* Virginia, 135 U. S., 662; 34 L. Ed., 304.

Robertson *v.* Peeples, — S. C., —.

State *v.* Pacific Guano Co., 22 S. C., 74.

Terre Haute, etc., R. Co. *v.* Indiana, 194 U. S., 579; 48 L. Ed., 1124.

Wheeling, etc., Ry. *v.* Town of Triadelphia, 52 S. E., 506.

White *v.* Britton, 75 S. C., 428.

Second Specification: Error in Holding That There Was a Condition Subsequent in Defendant's Contract with the State.

FIRST AND SECOND ASSIGNMENTS OF ERROR.

AUTHORITIES CITED.

Atlantic and Pacific R. Co. *v.* Mingus, 165 U. S., 413; 41 L. Ed., 770.

Columbia Water Power Co. *v.* Campbell, 75 S. C., 34.

Columbia Water Power Co. *v.* Columbia Elec. St. Ry., Lt. & Power Co., 43 S. C., 154; 172 U. S., 475; 43 L. Ed., 521.

Farnsworth *v.* Ry., 92 U. S. (2 Otto), 49; 23 L. Ed., 530.

Hammond *v.* Ry., 15 S. C., 10.

Harling *v.* Witte, 18 N. W., 175; 59 Wis., 285.

Hyman *v.* Read, 13 Cal., 444, 458.

Mead *v.* Ballard, 74 U. S. (7 Wall.), 290; 19 L. Ed., 190.

Oregon & C. R. Co. *v.* U. S., 238 U. S., 393; 59 L. Ed., 1360; 243 U. S., 549; 61 L. Ed., 890.

Railroad *v.* White, 10 S. C., 155.

Ruch *v.* City of Rock Island, 97 U. S. (7 Otto), 693; 24 L. Ed., 1101.

Schlesinger *v.* Ry., 152 U. S., 444; 38 L. Ed., 507.

Schulenberg *v.* Harriman, 88 U. S. (21 Wall.), 44; 22 L. Ed., 551.

Stanley *v.* Colt, 72 U. S. (5 Wall.), 119; 18 L. Ed., 502.

State *v.* Cardoza, 8 S. C., 71, 81.

State *v.* Columbia Water Power Co., 82 S. C., 181; 85 S. C., 113; 90 S. C., 568.

U. S. *v.* Northern Pacific Ry., 177 U. S., 435; 44 L. Ed., 836.

U. S. *v.* Tennessee, etc., Ry., 176 U. S., 242; 44 L. Ed., 452.

3 Washburn Real Property (6th ed), section 2020.

Third Specification: Contract was Impaired by State Courts and Act of 1917 Declaring and Adjudicating Forfeiture Without Demand for Performance of the Alleged Condition Subsequent and Notwithstanding Defendant's Offer to Complete.

THIRD, SEVENTH, EIGHTH, NINTH, AND TENTH ASSIGNMENTS OF ERROR.

Bonniwell *v.* Madison, 107 Iowa, 85; 77 N. W., 530.
Bradstreet *v.* Clark, 21 Pick. (Mass.), 389.
Cory *v.* Cory, 86 Ind., 567.
Donnelly *v.* Eastes, 94 Wis., 390.
3 Elliot on Contracts, section 2098.
Hurto *v.* Grant, 90 Iowa, 414.
Kampman *v.* Kampman (Ark.), 135 S. W., 905.
Lindsey *v.* Lindsey, 45 Ind., 552.
Merrifield *v.* Cobleigh, 4 Cush. (Mass.), 178.
Tiffany on Real Property, page 174, section 71.

THE OFFER TO COMPLETE.

Wheeling, etc., Ry. Co. *v.* Town of Triadelphia, 58 W. Va., 487; 52 S. E., 499; 4 L. R. A., N. S., 321.

Fourth Specification: Error in Holding that "As Soon as is Practicable," as Used in the Act of 1887, Required the Canal to be Completed as Soon After 1894 as the Construction Work Could be Done.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR.

AUTHORITIES CITED.

Crabb's English Synonyms, page 562.
Jaynes *v.* Pennsylvania Ry. Co., 83 Atl., 318.

Pittsburgh Ry. *v.* Indianapolis Traction Co., 169 Ind., 634; 81 N. E., 487.

Reedy *v.* Smith, 42 Cal., 251.

The Benton, 51 Fed., 302.

U. S. *v.* Wise and U. S. *v.* Thornburg, 7 Fed., 190.

Wilcox *v.* Supreme Council, 123 N. Y. Supp., 83.

Fifth Specification: Error in Holding That the Case was not Removable.

THIRTEENTH ASSIGNMENT OF ERROR.

Smith *v.* Kansas City Title & T. Co., 255 U. S., 180; 65 L. Ed., 577.

ARGUMENT.

Jurisdiction of This Court.

This is a clear case within the jurisdiction of this court under a long and unanimous line of decisions, so much so that argument is unnecessary.

The whole record shows that defendant drew in question the validity of the subsequent Act of 1917, both according to its original terms and "as construed and applied," as early as, as often as and in every way possible under the South Carolina practice. This was done by demurrer (p. 14), by petition for removal (p. 16), by exceptions on the first appeal (pp. 25-29), by answer (pp. 40-41), by motions for nonsuit (p. 104) and directed verdict (p. 203), and by exceptions on the second appeal (pp. 207-211). In each instance the grounds were clearly made and urged that the subsequent statute was repugnant to the contract-impairment and due-

process clauses of the Federal Constitution, but the State court sustained its validity notwithstanding. In such a case a writ of error is the appropriate process for reviewing the final judgment.

That a writ of error lies in such a case is no longer open to question under the cases decided by this court in construing section 237 of the Federal Judicial Code, as amended by the statute of September 6, 1916: Dahne-Walker Milling Co. *v.* Bondurant, decided December 12, 1921, page 114 of advance sheet No. 5 of 66 L. Ed.; Merchants National Bank *v.* Richmond, 256 U. S., 635; 65 L. Ed., 1135, which was approved and followed in United Fuel Gas Co. *v.* Hallanhan, decided December 12, 1921, page 130 of advance sheet No. 5 of 66 L. Ed., and Eureka Pipe Line Co. *v.* Hallanhan, decided December 12, 1921, page 127 of advance sheet No. 5 of 66 L. Ed. See particularly Columbia Water Power Co. *v.* Columbia Electric Street Railway, Light & Power Company (this was plaintiff in error here under its former name), 172 U. S., 475; 43 L. Ed., 521. Other recent decisions to the same effect are: Kansas City S. R. Co. *v.* Road Improvement Dist. No. 6, 256 U. S., 658; 65 L. Ed., 1151; Kenney *v.* Loyal Order of Moose, 252 U. S., 411; 64 L. Ed., 638; Yazoo, etc., R. Co. *v.* Mullins, 249 U. S., 531; 63 L. Ed., 754; New Orleans, etc., R. Co. *v.* Scarlet, 249 U. S., 528; 63 L. Ed., 752.

The petition for rehearing was considered and dismissed on January 26, 1922 (p. 222). The writ of error was applied for, allowed and approved, together with the supersedeas bond, on February 18, 1922 (pp. 223-231). Citizens Bk., etc., *v.* Opperman, 249 U. S., 448; 63 L. Ed., 701; Chicago G. W. R. Co. *v.* Basham, 249 U. S., 164; 63 L. Ed., 534; Andrews *v.* R. Co., 248 U. S., 272; 63 L. Ed., 236.

The writ brings up the whole case—both first and second appeals. Coe *v.* Armour Fertilizer Works, 237 U. S., 413; 59 L. Ed., 1027.

Questions Before This Court.

On the first branch of this question we are content to quote the following from Detroit United Railway *v.* Michigan, 242 U. S., 238, 249; 61 L. Ed., 268, 274: "But, notwithstanding what was there said, it is too well settled to be open to further debate, that where this court is called upon in the exercise of its jurisdiction to decide whether State legislation impairs the obligation of a contract, we are required to determine upon our independent judgment these questions: (1) Was there a contract? (2) If so, what obligation arose from it? (3) Has that obligation been impaired by subsequent legislation? Houston & T. C. R. Co. *v.* Texas, 177 U. S., 66, 77; 44 L. Ed., 673, 680; 20 Sup. Ct. Rep., 545; St. Paul Gas Light Co. *v.* St. Paul, 181 U. S., 142, 147; 45 L. Ed., 788, 791; 21 Sup. Ct. Rep., 575; Terre Haute & I. R. Co. *v.* Indiana, 194 U. S., 579, 589; 48 L. Ed., 1124, 1129; 24 Sup. Ct. Rep., 767."

The judgment below rests upon the Act of 1917 and would not and could not have been rendered without it. The very contract here in question has been expressly held to be valid and entitled to protection under the Federal Constitution, both by this court and the Supreme Court of South Carolina, so that its validity is no longer open to question. Columbia Water Power Co. *v.* Columbia Elec. St. Ry. Lt. & Power Co. (the plaintiff in error here under its former name), *supra*, 172 U. S., 475; 43 L. Ed., 521; Columbia Water Power Co.

v. Campbell, 75 S. C., 34. The only change here is that defendant purchased from the Columbia Water Power Co. in 1905 (Exhibit 6, p. 139).

That force and effect has been given to the subsequent Act of 1917 cannot be seriously questioned, but the Supreme Court of South Carolina seeks to avoid this by its construction of the contract and its declaration that there has been no impairment. These questions are, however, for this court. And we submit that the lower court has seriously erred on both questions.

"But in this case there were State laws passed subsequent to the making of the alleged contracts in question, in the form of the legislation of 1905 and 1907 extending the corporate limits of the city. And it is not correct to say that the decisions of the State court turned upon the mere meaning of the contracts without reference to these subsequent laws. But, in cases of this character, the jurisdiction of this court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the State court of last resort, and this irrespective of the process of reasoning by which the decision is reached, or the precise extent to which reliance is placed upon the subsequent legislation. McCullough *v.* Virginia, 172 U. S., 102, 116, 117; 43 L. Ed., 382, 387, 388; 19 Sup. Ct. Rep., 134; Houston & T. C. R. Co. *v.* Texas, 177 U. S., 66, 77; 44 L. Ed., 673, 680; 20 Sup. Ct. Rep., 545; Terre Haute & I. R. Co. *v.* Indiana, 194 U. S., 579, 589; 48 L. Ed., 1124, 1129; 24 Sup. Ct. Rep., 767; Louisiana *ex Rel.* Hubert *v.* New Orleans, 215 U. S., 170, 175; 54 L. Ed., 144, 147; 30 Sup. Ct. Rep., 40; Fisher *v.* New Orleans, 218 U. S., 438, 440; 54 L. Ed., 1099, 1100; 31 Sup. Ct. Rep., 57;

Carondelet Canal & Nav. Co. *v.* Louisiana, 233 U. S., 362, 376; 58 L. Ed., 1001, 1006; 34 Sup. Ct. Rep., 627; Louisiana R. & Nav. Co. *v.* Behrman, 235 U. S., 164, 170; 59 L. Ed., 175, 180; 35 Sup. Ct. Rep., 62. The necessary operation of the decisions under review is to give an effect to the annexation acts that substantially impairs the alleged contract rights of plaintiff in error as they theretofore stood; and it makes no difference that that result was reached in part by invoking the provisions of another agreement supposed to be binding upon plaintiff in error." (Quoted from Detroit United Railway case, *supra.*)

In Bank of Minden *v.* Clement, 256 U. S., 126; 65 L. Ed., 857, this Court said: "In Sturges *v.* Crowninshield, 4 Wheat., 197, 198; 4 L. Ed., 549; Opinion by Mr. Chief Justice Marshall, it was said: 'What is the obligation of a contract, and what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. * * * Any law which releases a part of this obligation must, in the literal sense of the word, impair it. * * * But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents, and integrity constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation.' And, in Planters' Bank *v.* Sharp, 6 How., 327; 12 L. Ed., 458, opinion by Mr. Jus-

tice Woodbury: 'One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force.' Ogden *v.* Saunders, 12 Wheat., 213, 257; 6 L. Ed., 606, 621; McCracken *v.* Heyward, 2 How., 608, 612; 11 L. Ed., 397, 399; Edwards *v.* Kearzey, 96 U. S., 595, 600; 24 L. Ed., 793, 795."

In Green *v.* Biddle, 8 Wheat., 1, 84; 5 L. Ed., 547, 568, the court said: "The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however, minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation."

We quote from Atlantic & Pacific Ry. *v.* Mingus, 165 U. S., 413, 434; 41 L. Ed., 770, 779: "But while we think the practice of forfeiting by legislative act is too well settled to be now disturbed, we do not wish to be understood as saying that this power may be arbitrarily exercised, or that the grantee may not set up in defense any facts which he might lay before a jury in a judicial inquisition. It would comport neither with the dignity of the government, nor with the constitutional rights of the grantee to hold that the government by an arbitrary act might devest the latter of his title when there had been no breach of the conditions subsequent, or when the government itself had been manifestly in default

in the performance of its stipulations. The inquiry in each case is a judicial one, whether there has been, upon either side, a failure to perform, and it makes but little practical difference whether such inquiry precedes or follows the re-entry or act of forfeiture."

We also submit that when defendant purchased this property in 1905 there was a construction of this contract, by the courts and legislature of South Carolina, entirely opposite to that now sought to be placed on it, and that the Federal Constitution protects defendant in the former construction, under Gelpcke *v.* Dubuque, 68 U. S. (1 Wall.), 222; 17 L. Ed., 519, and Muhlker *v.* N. Y. & H. R. Co., 197 U. S., 544; 49 L. Ed., 872.

First Specification: Impairing Defendant's Contract and Depriving Defendant of Due Process of Law by Giving Force and Effect to the Act of 1917 as a Legislative Adjudication of Forfeiture.

This specification assumes that there was a condition in the acts of 1887-1890 and does not present the argument in strictly logical order. But we are confident that defendant's constitutional rights were impaired, even though there was a condition, and do not believe it will be necessary for the court to pass this point—hence we present it first.

Without intending to be disrespectful to the courts or Legislature of South Carolina, our duty to our client requires us to point out that the State in 1917, as a bomb-shell from a clear sky, determined to forfeit this property with its valuable improvements. The State did not want completion, it wanted only forfeiture. If it had wanted completion the

Legislature could have said so instead of disguising its desires as it did in the act of 1917, and as the Canal Commission did in carrying out that act; or the offer to complete would have been accepted.

The Legislature was so bent on securing a judgment of forfeiture that it passed the act of 1918 (*infra*, page 102), so that this Canal Commission could fish for the evidence necessary to win the suit among defendant's records. The Supreme Court permitted them to proceed. (See Robertson *v.* Peeples, — S. C.,—.) The result was that much of the State's evidence was secured on this investigation and used on the trial of this case over defendant's protest. (See pages 42, 128, 130-131.)

The Supreme Court of South Carolina held on the first appeal that the "Legislature did not undertake to adjudicate anything" by the act of 1917 but merely declared its opinion and "directed a judicial investigation and determination of the question in accordance with law" (page 215). The court thus recognized that the Legislature had no more power of adjudication and determination than a private person or corporation party to such a contract would have had in the same situation. But what did the trial court do, and the Supreme Court on the second appeal?

The trial court, in his ruling and charge (pages 204-206), first referred to the legislative construction of the Act of 1887, found in the Act of 1917, and emphasized the legislative declaration of forfeiture in the later act. He then proceeds to give effect to the "declaration of the General Assembly that failure to complete the canal within the time mentioned was a failure to fulfill the conditions contained in the grant."

When the Supreme Court said on the first appeal that the Act of 1917 "directed a judicial investigation and determination of the question in accordance with law," it meant under the rules of law and practice prevailing when the Act of 1917 was enacted, and of which the Act of 1917 was no part. It meant that when the State came into court she must prove the facts entitling her to a judgment of forfeiture the same as any other plaintiff.

Even if the Act of 1917 had attempted to relieve the State from this burden of proof it could not have constitutionally done so. The Supreme Court said it did not attempt to do so. But the trial court said this legislative declaration was "entitled to some respect" although the court could inquire into the facts and determine whether or not the "facts as found by the Legislature were true." In other words, that the legislative finding of facts in its own case, in its own favor, raised a presumption in its favor that such facts were true and cast a burden on defendant to rebut such presumption. The plaintiff succeeded because of this presumption and not because the State had, as any other party plaintiff, established its case by legal evidence "in accordance with law," as required by this court.

The presumption prevailing, the trial "court must conclude that the finding of the General Assembly was justified and not arbitrary. * * * the act of the Legislature declaring the forefeiture * * * is binding on the court under the evidence * * *" (pages 204-205).

The State succeeded because its own self-serving declaration was admitted in evidence and held to be *prima facie* conclusive of the truth of the facts declared.

But the question here goes deeper, and we submit that, even

though the Act of 1917 be constitutional under the construction given it on the first appeal, the construction and effect given it by the trial court, affirmed on the second appeal, causing and resulting in the judgment adverse to defendant, brings it into conflict with the Federal Constitution. It is the construction and effect given the statute, causing an adverse result, that must be considered.

But, it may be argued, the trial court did not give effect to the legislative declaration as a finality, he held it to be merely presumptive. The answer to this is that, as to its rights under this contract, the State could not legislate at all, it could only authorize its agents to endeavor to establish its rights according to due process of law. The State could not change the rules of evidence by legislating a presumption in its own favor. The State could not make its own self-serving declaration even competent evidence of the facts declared, much less presumptively conclusive of their truth.

The subsequent Virginia laws requiring the production of the State bond to establish the genuineness of coupons therefrom, and excluding expert testimony as to genuineness were held invalid because they imposed burdens on the bondholders not required by the law when the bonds were issued. McGahey *v.* Va., 135 U. S., 662; 34 L. Ed., 304.

What was the existing law in 1917 and what did the State have to prove under it to secure a judgment of forfeiture?

The rights of the State were those given it by the then existing law as a grantor of the canal property under the acts of 1887 and 1890—to go into Court after re-entry made, and prove the facts establishing a breach of the condition subsequent to complete the canal "as soon as is practicable." The law then was that the self-serving declaration of a party

was not competent to establish the facts so declared; that the grantor could not declare a breach of condition and rely on his declaration as *prima facie* evidence of the existence of the facts declared. "When the State comes into her own courts to assert a right of property she is, of course, bound by all the rules established for the administration of justice between individuals. This is practically an action for the recovery of real estate, and one of the rules of procedure applicable in such case is that the plaintiff must recover upon the strength of his own title, and not the weakness of the defendant's." State *v.* Pacific Guano Co., 22 S. C. 74.

As well said in Wheeling, etc. Ry. *v.* Town of Triadelphia, cited at length *infra*, 52 S. E. at 506: "The legislature of the State, in declaring a forfeiture, performs exactly the same function that the (city) council performed in this case. It necessarily ascertains the existence of cause of forfeiture. An individual in declaring the forfeiture of a contract right, does the same thing. But no court has ever regarded such declaration in either case as an adjudication. Nor do they so regard such declarations made by municipal councils."

The well-established rule has always been that "where a condition subsequent is averred to have been broken, the burden of proof is upon the party asserting such fact" 18 C. J., 429.

"The right of a grantor to say in his deed that the property conveyed shall be devoted to a particular purpose and that it shall revert to his estate when not so used, should be fully recognized and protected, yet as the law does not favor forfeitures, before the courts will declare one, a breach of the conditions of the deed must be clearly proved." White *v.* Britton, 75 S. C., 428.

We confess that it is difficult to understand upon what grounds the Supreme Court affirmed this ruling of the trial court—but it did affirm it, thus giving the same force and effect to the Act of 1917 as the trial court did. (See Point III, on page 217.) The trial court did not hold that the Act of 1917 was binding in that it stated the conditions upon which the State would waive the forfeiture. He gave it presumptive effect as evidence that the condition had in fact been violated—as evidence to help the State prove her case in chief. This is what was done, as a practical matter, and it is not the form but the practical construction and application given the statute that counts.

In concluding this point, we respectfully submit that Carondelet Canal etc. Co. *v.* Louisiana, 233 U. S., 362,; 58 L. Ed., 1001, is conclusive in our favor, both as to jurisdiction and the merits. The language of the opinion is so very pertinent that we quote, as follows (233 U. S., 376-378): "There is, as we have said, strength in the contention; but, of course, the fact that the Supreme Court did not refer to the Act of 1906 does not put it aside from consideration. If it was the assertion of legislative power against the contract of the company, and a legislative provision against the obligation of the contract, and was an essential, although unmentioned, element of the decision under review, it is a basis in the Federal question set up. Nor need bad motives be imputed to the Legislature. It is not the motive which caused the enactment of the law which is of account, but the effect of the enactment, impairing the rights resting in the contract. And this, we think, was the effect of the Act of 1906. It was treated as an important factor in the State's petition in both the charging part and the prayer. The

board of control had something else to do besides to wait. It was an agency of invasion, and it was by its especial command that the attorney general made demand upon the company. And in this the board exercised the power given it; and to remove the impediments to the exercise of the power, 'all laws and parts of laws in conflict with' the Act of 1906, which conferred the power, were repealed. * * * The provision of the Constitution against the impairment of the obligation of contracts was intended 'to prohibit every mode or device having such purpose. The prohibition is universal. It attempted no enumeration of the modes by which contracts might be impaired. It would have been unwise to have made such enumeration, since it might have been defective' *Id.* § 1386. The precaution was necessary. The prohibition is directed against the exertions of sovereignty which the citizens, unless protected by the organic law, would be impotent to resist, whether boldly declared in an explicit law or disguised in an ambiguous form. This case is an illustration. Here is a property sought to be taken from the canal company, and there can be no doubt that the board of control, through the affirmative and repealing provisions of the Act of 1906, was to be the instrument and moving agency."

This case is, of course, in line with the long established rule of this Court. We quote from Terre Haute, etc., R. Co. *v.* Indiana, 194 U. S., 579, 589; 48 L. Ed., 1124, 1129: "It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the State court put forward

the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this Court. Louisville Gas Co. *v.* Citizens' Gaslight Co., 115 U. S., 683, 697; 29 L. Ed., 510, 516, 6 Sup. Ct. Rep., 265."

Second Specification: Error in Holding That There was a Condition Subsequent in Defendant's Contract with the State.

The State received "a large and valuable consideration" for this grant—"and this contract was for a valuable and adequate consideration." The Act of 1887, as amended in 1890, was an offer to sell—it was contractural and not governmental legislation. Columbia Water Power Co. *v.* Campbell, *supra*, 75 S. C., 34. The State stands in no better position than the seller in an ordinary business contract of this character, and this contract is to be construed as such. 3 Washburn Real Property (6 Ed.), section 2020, Hyman *v.* Read, 13 Cal., 444, 458.

The precise question whether this completion clause (in section 7 of the Act of 1887) is a condition may possibly never have been expressly decided, but the entire trend of previous and contemporary judicial and legislative construction in South Carolina negatives any legislative intention to create a condition here. In 1878, Railroad Co. *v.* White, 10 S. C., 155, pointed out that the expression of one condition in a statute granting a charter forbade the addition of others by implication. In 1881, Hammond *v.* Ry., 15 S. C., 10 (unbroken as authority until this case), held that to create a condition subsequent there must be appropriate

words expressing the intention plus a clause of re-entry or forfeiture. The legislature knew this rule and followed it strictly in the Act of 1887—section 1 of that statute contained an express condition under the Hammond case and then the White case forbade the addition of others by implication.

A study of the Act of 1879, which dealt with a previous sale of this property and which was closely followed by the Act of 1887, will very clearly show that the legislature, at that time, knew how to express a condition when it so intended.

Section 7 of the Act of 1887 required completion to Gervais Street within two years (by December 24, 1889), yet this was not accomplished until December 11, 1891 (page 137). This requirement as to completion to Gervais Street was as much a condition as the completion to the river was. Was it such, and, if so, had the Board of Trustees forfeited the property before they conveyed it in January, 1892? Was not this first requirement (as to Gervais Street) merely evidence of the State's anxiety to have the canal completed to Gervais Street so that it would start getting its 1,500 horse power? If the legislature had intended completion to the river to be a condition wouldn't the proviso found in section 7 have been made applicable to the whole property rather than only to 500 horse power? If this clause of section 7 (completion to Gervais Street) was a condition, why was it not so worded as was the express condition (completion to Gervais Street within seven years) in section 1 of the Act of 1887?

Careful consideration of Columbia Water Power *v.* Campbell, *supra*, 75 S. C., 34, and of Columbia Water Power Com-

pany *v.* Columbia Elec. St. Ry. Lt. & Power Co., *supra,* both in the Supreme Court of South Carolina (43 S. C., 154) and in this court (172 U. S., 475) negatives any thought that section 7 contains a condition.

From 1908 to 1911 the Supreme Court of South Carolina had before it consideration of the requirement of section 5 of the Act of 1887 that "said canal shall be opened for navigation free of charge by the said Board of Trustees" and ordered the City of Columbia to remove certain pipes it had placed across same. State *v.* Columbia Water Power Co., 82 S. C., 181; 85 S. C., 113; 90 S. C., 568. Wherein lies the essential difference between the language of section 5 and that of section 7, which makes the former an obligation enforceable by mandatory injunction and the latter a condition subsequent working a forfeiture? And why? The legislature did not think much (at that time) of opening the canal for navigation. (See Act of 1914, *infra*, page 94.)

In the Dixon and Graydon Resolutions of 1910 (Exhibits 50-D and 50-E, pages 197-200 of Record) the obligation to complete to the river is mentioned among the "duties," "obligations," and "requirements" imposed by the acts of 1887-1890, but no mention is made of any "conditions." Section 6 of the Act of 1912 (*infra*, page 94) speaks only of the "obligations and liabilities" imposed by the Act of 1887 and seeks to induce defendant to "contract, covenant, and agree" to complete the canal. This shows a legislative doubt whether there was any obligation at all to complete.

Is it reasonable to say that the legislature having expressed its reversionary right to the whole property in section 1 of the Act of 1887, and to the 500 horse power in section 7, in-

tended by implication to reserve its reversionary right to the whole property in section 7 and yet neglected to say so? Contrast the language of section 1 with that of section 7 (as regards completion).

Section 13 of the Act of 1887 requires that an accurate abstract of same be printed on the bonds authorized by sections 9 and 10—it does not mention "conditions." Section 12 of the Act of 1879 (*infra*, page 58) expressly provides that any encumbrance was to be subject "to the condition that the work is completed," etc.

What is to happen to the security of the holders of the bonds issued under the Act of 1887? The State forfeits the property—the city is liable on its guaranty, but with no chance of reimbursement under section 4 of the second Act of 1887? What happens to the other purchasers and lessees under sections 16 and 21 of the Act of 1887—do they forfeit, if not, why not?

It was argued below that the deed to Columbia Water Power Co. (Exhibit 5, page 135) was "subject, nevertheless, to the conditions, limitations, provisos, and exceptions set forth and prescribed in the Acts" of 1887 and 1890, and that defendant's deed (Exhibit 6, page 139) was similar, and that "conditions" was so used for some purpose. *The word "condition" was not used in section 2 of the Act of* 1890 (the authority to sell), so the deed could not have referred to that. Such words are often loosely used in deeds without any particular reference, out of greater precaution on the grantor's part, but to this most technical argument there is a conclusive, if technical answer. Section 1 of the Act of 1887 contained an express condition subsequent and the deeds may well have referred to this.

"Where an agreement is entered into by a State through an act of its General Assembly, its terms are to be found in the provisions of the act to which it owes its creation." State *v.* Cardoza, 8 S. C., 71, 81, decided in 1876. Does this authorize resort to the imaginary intention of the legislature, other than that expressed in language, to find a condition subsequent working a forfeiture? If the condition was found in the acts of 1887-1890 it would have been simple for the court to point it out. Did the purchaser have to study all the statutes of South Carolina relating to the canal (and they are legion, many before the first act copied in the appendix to this brief, running as far back as A. D. 1825) and determine the "purpose" running through them "as an unbroken thread," or was his contract contained in the acts of 1887-1890? Is a legislative "purpose" as to property it sells a condition subsequent of the grant, even though not expressed in language as a condition?

The language quoted by the South Carolina Supreme Court (at page 214): "subject to the performance of the conditions and limitations herein prescribed," is taken from section 1 of the Act of 1887, which directed the Board of Directors of the Penitentiary (one State agency) to convey to the Board of Trustees (another State agency)—*it is not the authority under which defendant or its predecessor purchased.* The Act of 1887 was amended by the Act of 1890 and section 2 of the latter authorized the Board of Trustees to convey "*subject*, however, *to* all the *duties* and *liabilities* imposed thereby, and *subject* to all *contracts, liabilities*, and *obligations* made and entered into by such board prior to such sale and transfer * * *." *What a difference!*

Does a purpose (amounting to a condition subsequent)

as to completion run as an unbroken thread through the legislative (or judicial) history as stated by the court? In the numerous legislative and judicial references to the Act of 1887 we find the obligations imposed thereby variously spoken of as "duties," "obligations," "requirements," "limitations," etc., and only once is "conditions" even loosely used. See 90 S. C., 578, where Justice Woods speaks of one "of the conditions and limitations" in referring to the requirement of section 5, requiring the canal to be kept open for navigation, which requirement he holds to be a contractual obligation enforceable by mandatory injunction, showing the sense in which he uses the word.

We firmly rely upon Oregon & C. R. Co. *v.* U. S., 238 U. S., 393; 59 L. Ed., 1360; upon a second appeal, 243 U. S., 549; 61 L. Ed., 890, wherein this court passed on almost identical language in a Federal statute, but found it lacking in certainty and necessity, so far as concerned its construction as a condition working a forfeiture. There was no valuable and direct pecuniary consideration to the government in that case as there is in this. The only benefit there was to the public resulting from the two purposes of the grant, (1) to promote the building of railroads and (2) to promote the settlement of unpeopled areas. It was not a strictly money, business contract such as ours.

That there is no necessity here to construe the obligation to complete as a condition is apparent when both courts recognize that as a covenant it can be enforced by mandatory injunction.

The Supreme Court of South Carolina holds that a condition may be created by speculating as to the intention of the legislature and without either express words of condition

or express words of reverter. We submit that this is contrary to the uniform rule in this country, as well as that adopted by this Court. This Court has found a condition subsequent without express words of reverter, but in these cases there were express words of condition. Atlantic and Pacific R. Co. *v.* Mingus, 165 U. S., 413; 41 L. Ed., 770; Mead *v.* Ballard, 74 U. S. (7 Wall.), 290; 19 L. Ed., 190; U. S. *v.* Northern Pacific Ry., 177 U. S., 435; 44 L. Ed., 836. It has also found a condition where there were express words of reverter: Schulenberg *v.* Harriman, 88 U. S. (21 Wall.), 44; 22 L. Ed., 551; Farnsworth *v.* Ry. 92 U. S. (2 Otto), 49; 23 L. Ed., 530. It has also found a condition where there were both express words of condition and express words of reverter: Schlesinger *v.* Ry., 152 U. S., 444; 38 L. Ed., 507; U. S. *v.* Tennessee, etc., Ry., 176 U. S., 242; 44 L. Ed., 452. In Ruch *v.* City of Rock Island, 97 U. S. (7 Otto), 693; 24 L. Ed., 1101, the language of the instrument is not given, but this concededly contained a condition subsequent, and the only question was as to the necessity of a re-entry. In Stanley *v.* Colt, 72 U. S. (5 Wall.), 119; 18 L. Ed., 502, this Court held that the use of the word "provided" in ordinary deeds or wills does not necessarily create a condition. In Harling *v.* Witte, 18 N. W., 175; 59 Wis., 285, the court held that the absence of a reverter clause was very strong evidence against the intention to create a condition, and especially so in the absence of express words of condition.

Third Specification: Contract was Impaired by State Courts and Act of 1917 Declaring and Adjudicating Forfeiture Without Demand for Performance of the Alleged Condition Subsequent and Notwithstanding Defendant's Offer to Complete.

From the "Statement" setting forth the legislative history of the Columbia canal we think the conclusion well-nigh inescapable, assuming for sake of argument that the acts of 1887-1890 and the deeds to this defendant and its predecessors in title thereunder contain a condition subsequent, that the State has waived its right to forfeit in the absence of a precise demand for performance of the alleged condition subsequent.

No authority need be cited—it is elementary—that parties contracting have in contemplation the general rules of construction applicable to the sort of contract entered into, and that such applicable general rules are a part of the contract, as much so and as effectually, as if embodied in appropriate language in the contract itself.

That no demand was ever made upon this defendant to complete the canal is abundantly shown by the record herein (R., pages 195-203). On the contrary, the State consistently refused to make demand. The authorities are somewhat divided upon the question of the necessity for a demand in the ordinary case of a condition subsequent, but there is little difference among them that in cases like this, where there is no fixed time for performance, conclusive evidence of waiver, laches, receipt of substantial benefits contemplated by the grant over a long period of years, great expenditures for improvements, inability to restore the *status quo*, and an offer to comply, there should be a specific

and precise demand for performance; that the right to such a demand is a part of the contract and consequently a forfeiture without such demand is an impairment of the obligation of the contract.

The State Court on the first appeal (page 215 of Record), held: "There is authority for the proposition that where no time is fixed for the performance of a condition a reasonable time is intended, and no default can ordinarily attach until after a demand and refusal to perform." Citing *3 Elliott on Contracts*, section 2098, which says: "Where no date is fixed for the performance of a contract, a reasonable time is intended, and no default can, ordinarily, attach until after a demand and a failure or refusal to perform."

The following are a few well considered cases sustaining the contention that in this case a demand was necessary before a forfeiture could be incurred:

Bonniwell *v.* Madison, 107 Iowa, 85; 77 N. W., 530.
Kampman *v.* Kampman (Ark.), 135 S. W., 905.
Tiffany on Real Property, page 174, section 71.
Lindsey *v.* Lindsey, 45 Ind., 552.
Cory *v.* Cory, 86 Ind., 567.
Bradstreet *v.* Clark, 21 Pick. (Mass.), 389.
Merrifield *v.* Cobleigh, 4 Cush. (Mass.), 178.
Hurto *v.* Grant, 90 Iowa, 414.
Donnelly *v.* Estes, 94 Wis., 390.

Tiffany on Real Property, *supra*, says: "Where the performance of a condition in any way depends on the pleasure of the person entitled to performance, as regards the manner or time of performance, or as to whether it shall be done at all, he must request performance of the condition in order to

be able to claim a forfeiture, but otherwise no demand for performance is necessary."

In Lindsey *v.* Lindsey, *supra,* it was held that the will before the court created a life estate in the wife with remainder in fee to "W" upon a condition subsequent that he remain on the farm, support his mother, and pay certain named sums to his sisters. In an action for forfeiture for alleged breach of condition, the court said: "It is well settled that before there can be a forfeiture of an estate held on condition subsequent, there must be a demand on the part of the person entitled to insist upon its performance, whether the condition consists in the payment of money or the performance of some other act, and a refusal on the part of the person in whom the title is vested * * *."

In Cory *v.* Cory, *supra,* there was a devise upon condition subsequent that the devisee provide for the maintenance and comfort of his sister Catherine during her life. The devisee supported Catherine a number of years, but ceased to do so, and upon proof that the plaintiffs other than Catherine had made demand upon the devisee, the court held that such demand was insufficient to forfeit the estate, saying: "There must be a demand on the part of the person entitled to performance."

In Bradstreet *v.* Clark, *supra,* there was a devise for life with remainder to Nathaniel Bradstreet upon condition subsequent that Nathaniel, upon the death of the life tenant, pay $10 each to Daniel and William Bradstreet and $200 to Abigail Kilham. It appeared that the legacies had been paid except the one to Daniel and that a demand had been made for payment of all three legacies, but no demand by Daniel. The sole question was whether the estate could be forfeited

and the court held that while the demand was sufficient to found an action at law for payment of the legacy yet it was not sufficiently precise and accurate to entitle claimants to forfeiture of the estate, saying: "Approving as we do the rule before alluded to, requiring greater precision and more perfect accuracy in a demand which shall subject the party to forfeiture of an estate, the court are of opinion, that no such demand was made in the present case as would operate to divest the tenant in the premises for a breach of condition annexed to the devise to Nathaniel Bradstreet."

In Merrifield *v.* Cobleigh, *supra,* in an opinion by the great Lemuel Shaw, the court say: "But there is another view, which it appears to us is decisive. Such a condition when relied on to work a forfeiture is to be construed with great strictness; the demandant shall have his exact legal right, but no more (Bradstreet *v.* Clark, *supra*). The condition in the present case is, that the estate shall be void, if the grantee, her heirs or assigns, shall "neglect" or "refuse" to support the fence * * *. In the present case it appears that no such demand or request was made, or notice given. There was therefore no breach of condition, which defeated the estate, at the time of the entry of the demandant, and this action cannot be maintained."

Hurto *v.* Grant, *supra,* a breach of a condition subsequent was alleged. The court say: "The rule is that the entry for condition broken must be after demand and refusal to perform in order to make such entry effectual to revert the title. That applies, unless by the terms of the deed, the title reverts for breach of condition without re-entry; but then the provision in that regard would not operate except on demand and refusal to perform."

These cases, and many others, are in accord with the universal policy of the law to avoid construing a deed as creating a condition subsequent, and if such construction be unavoidable to afford relief against a forfeiture, and they should be conclusive of this case in view of defendant's *bona fide* offer to complete the canal, perform the condition, as soon as its obligation to do so had been adjudicated by the State Court.

The Offer to Complete.

The first opinion was the first adjudication that there was ever any positive obligation of any kind to complete the canal. This decision was filed August 26, 1919 (page 212), and the remittitur came down September 5, 1919. On September 16, 1919, defendant wrote the Canal Commission making an unqualified offer to complete the canal, see Exhibit 8-N, page 159. The Commission replied on October 11, 1919, imposing conditions on their face impossible, see Exhibit 8-O, page 160. On November 6, 1919, and November 27, 1919, defendant agreed to such conditions in so far as it possibly could, see Exhibit 8-P, page 166, and 8-Q, page 169.

In order to shorten this argument, already too much extended in a sincere effort to explain the complexities of this case, as we see them, we content ourselves with a reference to the most exhaustive and best reasoned authority that we have been able to find on this point, and which, we believe, will appeal to this Court. Wheeling, etc., Ry. Co. *v.* Town of Triadelphia, 58 W. Va., 487; 52 S. E., 499; 4 L. R. A., N. S., 321.

Fourth Specification: Error in Holding that "As Soon as Is Practicable," as Used in the Act of 1887, Required the Canal to be Completed as Soon After 1894 as the Construction Work Could be Done.

When the Legislature in section 7 of the Act of 1887 said that the Board of Trustees shall "as soon as is practicable" complete the canal down to Congaree River, just what did it mean?

The Supreme Court of South Carolina on the first appeal in this case has laid down as follows what we take to be a proper rule of construction:

> "The legislative intention must be gathered from the language of the statute—not that found in any particular section or proviso, but from the statute as a whole—and it must be read in the light of all the circumstances, the situation and relation of the parties, the subject of the grant, and the purpose to be attained" (R., p. 214).

Reading then the words "as soon as is practicable" in the light of all the circumstances, the situation and relation of the parties, the subject of the grant and the purpose to be attained, what do they mean? Is there anything to show that they were used in a technical sense, with an engineering or financial meaning? Nothing appearing to the contrary, it is fair to assume that the words were used in their usual and generally accepted sense. This assumption is borne out by the fact that the same words appear further on in sections 18 and 20 of this act (see page 70, *infra*), and four times in the Second Canal Act of 1887 (see sections 1, 4, 5, and 6, page 80, *infra*), used always not in a technical sense,

but in their ordinary and generally accepted sense—practicable under all of the circumstances and surrounding conditions; practicable when the result to be attained is of such value as to justify the work to be done.

This construction is supported by both reason and authority. In *Crabb's English Synonyms*, page 562, under the head of "Possible, practicable, practical," after giving the derivation of the words the following illustration is given:

> "There are many things *possible* which cannot be called *practicable;* but what is *practicable* must, in its nature, be *possible*. The *possible* depends solely on the power of the agent; the *practicable* depends on circumstances: a child cannot say how much it is *possible* for him to learn until he has tried; schemes have sometimes everything apparently to recommend them to notice, but that which is of the first importance, namely, their *practicability*. * * *"

In the case of *Pittsburgh Ry. v. Indianapolis Traction Company,* 169 Indiana, 634; 81 N. E., 487, the question arose as to whether it was practicable to eliminate a grade crossing. There was a statute providing that if two companies whose lines crossed could not agree they should petition the circuit court "and if the court shall find it is practicable to abolish the grade crossing" it should so order. The circuit court had decided for the defendant and, therefore, that it need not change the crossing. Chief Justice Hadley in rendering the opinion of the Supreme Court held that the first and controlling question for the court was whether or not the change was practicable and said, "The legislative meaning of the word practicable presents a subject of earnest debate between the parties." The appellant contended that

the term practicable "should be taken in the sense of physically practicable; or in the sense of an engineering problem." * * * "The construction insisted upon we think is too narrow." * * * "The word 'practicable' as used in the statute we think should be given its usual and ordinary meaning as indicated by the context. Plainly it is not synonymous with 'possible.' A thing practicable must necessarily be possible, but a thing may be possible that is not practicable. It cannot refer to apparent difficulties and cost alone, or the words 'finds practicable' become an idle phrase; for under modern engineering skill, there is hardly anything but may be accomplished at some cost. * * * The question, therefore, depends upon the circumstances of each particular case. These circumstances may be many and varied. Among them, the difficulties to be overcome in changing from a grade to a crossing above or below grade; the cost whether reasonable or extraordinary; the extent of public travel; the frequency of trains; the character of the country, whether level or hilly; whether the employees of one company may see the cars of the other company far enough away to put their own under control before reaching the crossing; to what extent, if at all, dangers to persons being conveyed by cars will be eliminated (etc., citing other considerations) * * * and such surrounding conditions as naturally and reasonably address themselves to the judgment of prudent and cautious persons."

"The expert civil engineers, eight in number, testified that an over or under grade crossing was practicable, but they disagreed as to which it should be, all manifestly testifying from a purely engineering point of view. In fact, the evidence is without conflict that the change from a grade to an

over or under grade crossing may be successfully accomplished at some cost. This state of the evidence, however, is not decisive of the case, as appellant contends that it should be. It may be conceded that an elevation of the track is possible without an extraordinary cost for a level surface, but this is but a single element of the ultimate fact, and falls far short of establishing its practicability under the broader meaning of the statute," and the Supreme Court sustained the judgment of the lower court.

In *Wilcox v. Supreme Council*, 123 N. Y., Supp. 83, the court held: "The word practicable does not necessarily mean 'possible of execution.' An act is practicable if conditions or circumstances permit its performance. It is practicable, if, under all the circumstances, it is feasible; if it can be done lawfully with reasonable convenience."

In *Jaynes v. Pennsylvania Ry. Co.*, 83 Atlantic, 318, the court had under consideration a railroad tariff in which it was provided that certain freight rates on potatoes should govern "when it is practicable for agents to weigh same," "but when it is not practicable to weigh same" estimated weights should govern. It appeared from the evidence that all of the stations where potatoes were shipped were equipped with either large scales or 500-pound scales on which potatoes could be weighed. The court held that it was properly left to the jury as to what opportunities the railroad company had for weighing the potatoes, and therefore if it was practicable to weigh them.

In the cases of *The Benton*, 51 Fed., 302; *U. S. v. Wise* and *U. S. v. Thornburg*, 7 Fed., 190, the word "practicable" was used in a statute providing that oil might be shipped in a vessel upon routes "where there is no other *practicable*

mode of transportation," and the court held that although there was an all-rail route over which the oil might be transported, yet if the rail rates were so high as to amount to a prohibition of the traffic the route was not practicable within the meaning of the statute. See also *Reedy v. Smith*, 42 Cal., 251.

In the opinion of Mr. Justice Frazer on the second appeal the words "practicable" and "impracticable" appear (R., p. 218). If the court had construed the word in the act to mean what the court used it to mean it must have reversed the lower court.

The circuit judge ruled that the grantee was required to complete the canal down to Gervais Street by December 24, 1894, and that thereafter it should "act promptly—with reasonable promptness" in completing the canal to Rocky Branch. As the testimony showed that the actual construction work would require from two to six years and since much more than that time had elapsed, he directed a verdict for the plaintiff. (See R., pp. 204, 205.) The grave errors committed in the construction placed on the words by his honor are that he read into the act the word "thereafter" and he eliminated therefrom the word "is." By the reading his honor gives the act the canal must be completed down to Gervais Street by 1894 and *thereafter* as soon as practicable to do the work it must be completed to Rocky Branch. In other words, his honor assumed that it was practicable to complete the canal and held that "practicable" had only to do with the time in which the work should be done. His honor therefore entirely loses sight of the fact that it may not have been practicable to complete the canal at the end of 1894 or at any other time. His ruling makes the duty to

complete absolute, whereas the contract makes it depend only on circumstances. He fixed definitely the time to commence the work, whereas the word *thereafter* does not appear in the act and the time to begin the work was dependent on circumstances. The word *is* in "as soon as *is* practicable" implies or at least suggests that it is not now practicable. The meaning is the same as "as soon as it becomes practicable." The legislature did not make either the obligation or the time definite. It could have done both—it doubtless obtained better terms by leaving them indefinite, and it cannot now change the contract.

The Supreme Court of South Carolina on the second appeal says that section 19 of the act calls for speed. It only provided for the speedy erection of factories after completion of the canal became practicable.

Was it practicable to complete the canal? If it was not practicable to do so in 1887, it certainly was not practicable in 1894, when the entire method of developing water power had so far changed as to render archaic all of the elaborate factory sites provided in the act. It was still less practicable in 1902, when the United States Government commenced the work of constructing a parallel navigable waterway up to Gervais Street, and each year since 1887 as inland navigation has declined it has become less practicable.

These changes in circumstances account for the astounding admission in the complaint that the Columbia Water Power Company, which held the canal up to 1905, used it in accordance with the terms of the act (R., p. 7). Now the court, acting under the Act of 1917, holds that not only did that company not utilize it in accordance with the act, but that it so far failed as to forfeit the property. The plaintiff

itself, through the Canal Commission, has solemnly declared that "it was at one time supposed that for navigation purposes it would not be necessary or expedient to extend the canal" (R., p. 44).

The Mayor and City Council of Columbia declared "As reasonable men we could see no need of a navigation canal" (R., p. 192). Why? Because it was not practicable.

The numerous hearings before the Legislative Committees, and investigations, were directed at what? To determine whether it was practicable to complete the canal.

Only to carry out the forfeiture Act of 1917 could the court have held otherwise.

Fifth Specification: Error in Holding That the Case was not Removable.

The right to remove depends, of course, upon whether the suit arises under the Federal Constitution within section 28 of the Federal Judicial Code. Craving reference to the petition for removal (page 16), we submit that the complaint shows on its face a conflict between the State statute and Federal Constitution, making the case one arising under the latter. Smith *v.* Kansas City Title & T. Co., 255 U. S., 180; 65 L. Ed., 577.

Respectfully submitted,

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STATUTES OF SOUTH CAROLINA REFERRED TO IN BRIEF.

Act of 1878.

"An Act to Authorize and Empower the Appointment of a Commission to Control and Direct the Development and Disposal of the Property of the State Known as the Columbia Canal and Its Appurtenances." (*16 Stat. S. C., 444.*)

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the Attorney General, Comptroller General, and Secretary of State and four citizens of the State to be appointed by the Governor, are hereby constituted and appointed a commission to take such steps as may be lawful to obtain possession of the property of the State known as the Columbia Canal, with its appurtenances, and to control and direct the development and the disposal of the same.

SEC. 2. Said commission shall have authority to grant, sell, or lease sites of this property to parties desiring to erect factories, on such terms as may be decided on by said commission: *Provided*, That in all cases they shall take bond with other good and sufficient security from grantees or other contracting parties for the fulfillment of their contracts, and shall make, annually, a report of all their actings and doings to the legislature.

SEC. 3. That for the purpose of developing the power, the commission is authorized to employ convicts from the penitentiary, and for that purpose may call on the superintendent for two hundred convicts.

SEC. 4. That said grants, leases, or sales shall only be made for manufacturing purposes, and shall revert to the State when not used for that purpose; and in all grants that may be made, sufficient power shall be reserved to the State for the use of the penitentiary and the city of Columbia.

SEC. 5. That the commission shall receive no pay, and shall continue in office until their successors are appointed.

Approved March 12, 1878.

Act of 1879.

"An Act to Authorize the Canal Commission Appointed Under and by Virtue of an Act Entitled 'An Act to Authorize and Empower the Appointment of a Commission to Control and Direct the Development and Disposal of the Property of the State Known as the Columbia Canal and Its Appurtenances,' Approved March 12, 1878, to Enter Into a Contract and Covenant for and on Behalf of the State, with David M. Thompson and Augustus F. Neagle, Their Heirs and Assigns, to Dispose of Said Columbia Canal, with a View to Its Development, Upon Such Terms and Conditions as Are Expressed in This Act." (*17 Stat. S. C., 87.*)

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the said Canal Commission shall, and they are hereby, authorized to enter into a covenant and agreement on the part and behalf of the State with David M. Thompson and Augustus F. Neagle, their heirs and assigns, to sell and dispose of the property of the State known as the Columbia

Canal, with a view to the development thereof, together with the lands held therewith, and all and singular the rights, members and appurtenances thereunto belonging, except the land along the canal between the head of Congaree River and the south side of Gervais Street, between which points all necessary rights of way for widening and deepening the canal, with all roadways necessary on both sides of said canal, shall be granted, and under said contract the right is hereby conferred upon the said parties, their heirs and assigns, to construct a dam across the Congaree River at or above the site of the penitentiary on said river, and across the Broad River, at or below the head of the present canal, either or both, as by future surveys may be deemed the best location for said dam or dams and the better development of said water power: *Provided always,* That where said canal shall cross any highway or street from said dam on Congaree River down to and including Gervais Street, said parties shall in no way be required to contribute to the building of any bridges which may be thereby rendered necessary: *Provided,* They make a suitable passway for migratory fish.

SEC. 2. That the said David M. Thompson and Augustus F. Neagle, their heirs and assigns, shall have the same right, and the same powers, privileges, and franchises are hereby conferred upon them, their heirs and assigns, to open a canal upon the Lexington shore of the Congaree River, and to build such banks, bulkheads, buildings, or other structures as may be necessary and convenient to the full development of the water power of the Congaree and Broad rivers at the city of Columbia.

SEC. 3. That in locating the dam on the Congaree River, the said parties, their heirs and assigns, shall have the right

to raise the waters of the said Congaree River to such a height at the said dam as will give a head and fall of twenty-two feet above the mean low water at the south side of Gervais Street; if the dam be located on Broad River, then they shall have the right to raise the waters on Broad River of such a height as will give a head and fall of thirty-four feet at the south side of Gervais Street at mean low water, with the right to build all necessary banks, abutments, or other structures on both sides of the said rivers as may be required to complete the said dam or dams across the said rivers or either of them; and the right is hereby granted to widen and deepen the said canal and change the course thereof in such manner as the said parties may consider necesasry for the better development of the said water power.

SEC. 4. That the said parties, their heirs and assigns, shall have the right of way, and the same is hereby granted, in and along the said canal, for the construction and operation of the same from the head of the Congaree River to Gervais Street, on the Columbia side of said river, and at all points below Gervais Street on the Lexington shore, and on Broad River to the head of the old canal; where any property lying along the said canal or canals shall be held as the private property of any person or persons, the said parties, their heirs and assigns, for the sake of the public improvement contemplated in the construction of the said canal or canals, and the better navigation of the said Congaree and Broad rivers, and the transportation of supplies to market, shall have the right to acquire such rights of way by condemnation and assessment for the uses aforesaid in the same manner as rights of way by law may be now acquired by railroads.

SEC. 5. That in consideration of the public improvement

and general benefit aforesaid, and the use by the State of fifteen hundred horse power of water power between the City Water Works and Senate Street, to be used as hereinafter provided, the city of Columbia is hereby authorized to enter into an obligation to hold the said parties, their heirs and assigns, harmless as against all damages done from the acquisition of all rights of way between the head of the Congaree River and Gervais Street, on the Columbia shore, and against the flowage of all low lands and back water above the dam so to be constructed across the Congaree.

SEC. 6. That, further, in consideration as aforesaid, the State hereby guarantees, and the said Canal Commission is hereby authorized in the name of the State to covenant with the said parties, their heirs and assigns, that for the space of three years, to commence within sixty days from the date of the said contract with the Canal Commission and the said parties, on the basis of two hundred and ninety-three and one-third working days, not more than ten hours each day, in each and every of said three years, the said parties shall have the use and employment of two hundred and fifty able-bodied male convicts, in lieu of the two hundred convicts granted to the Canal Commission under the provisions of an act entitled "An act to authorize and empower the appointment of a commission to control and direct the development and disposal of the property of the State known as the Columbia Canal and its appurtenances," approved March 12, 1878, if there be that number of such convicts in the penitentiary, and, if not, as near that number as practicable, in and for the construction of the said canal or canals, and the full development of the said water power and all other work connected therewith and contemplated by this act; the said con-

victs to be clothed, guarded, and directed by the Board of Directors, and to be placed upon the work and returned to prison each day by the officers of the penitentiary, and the superintendent and directors of the penitentiary are hereby directed to always make provision for supplying the said number of convicts for the purposes above mentioned, and shall at all times be ready, after thirty days' notice, to furnish the said convicts upon the demand of the said parties.

SEC. 7. That it be, and is hereby, provided that the said parties, their heirs and assigns, may agree with the directors of the penitentiary for a greater or less number of convicts to be used at any time upon the work, but only by the free consent of both parties, and such increase or diminution shall be charged or credited so as to make the aggregate labor the same as hereinbefore provided, to be computed as aforesaid; and if at the expiration of the three years as above provided, the said parties, their heirs and assigns, shall have used the said labor of a greater number of convicts than is hereinbefore provided, then the said parties, their heirs and assigns, shall pay to the State such price per day for each day's work of every able-bodied convict employed in excess of the stipulated number, as may be agreed upon by the said parties and the Board of Directors of the penitentiary.

SEC. 8. That in the event of the partial or total destruction of any work or works which the said parties, their heirs and assigns, may have done, by fire, flood, or other providential and unavoidable cause, in such case the said parties, their heirs and assigns, shall be entitled to an extension of the time hereinbefore limited for the completion of the said work corresponding to the delay so caused by the partial or total destruction aforesaid.

SEC. 9. That the said parties, their heirs and assigns, in consideration of the rights and franchises herein granted, shall, within the period of three years from the date of said contract, complete the construction of the dam or dams and the bulkheads as hereinbefore provided, and shall complete the canal or canals from the said bulkheads down to the quarry situate upon what is known as the Kinsler tract, about seven-eighths of a mile below Gervais Street, said canal on the Columbia shore to be so constructed as to develop 15,000 horse power, and they shall have in operation within the time aforesaid one cotton mill of 16,000 spindles, and they shall give to the State, between the Columbia Water Works and Senate Street, fifteen hundred horse power of water power, to be used or disposed of in such manner and on such terms as the State may direct.

SEC. 10. That for the purpose of inducing capital to invest in mills upon the said canal or canals, the cotton mill hereinbefore provided for, and any other mill or mills, warehouses or other structures pertaining thereto, erected upon the said canal or canals, which shall be used and employed in the manufacture of cotton fabrics, yarns, or other material of any kind, shall be entitled, and are hereby declared to be entitled, to all the rights and privileges extended to individuals and associations of individuals to a rebate of taxes for ten years, in accordance with the provisions of an act entitled "An act to aid and encourage manufactures," approved December 20, 1873; and the said provisions are hereby made and shall be deemed part and parcel of this act.

SEC. 11. That the said parties shall be put into possession under the agreement of sale herein authorized, and shall have the full enjoyment of the rights and franchises hereby

conferred and granted to carry out the purposes of the said agreement of the sale authorized to be made under the provisions of this act, but the title to the said property shall remain in the State until the conditions herein expressed shall be performed by the said parties, their heirs or assigns, or a bond conditioned for the payment of $100,000, with good and sufficient sureties thereto, shall be given for the faithful performance of the conditions of their contract, which said bond shall be approved by the Attorney General, at which time (either as to the giving of the said bond or the performance of the said conditions) the State shall convey or cause to be conveyed the said property, with its appurtenances, in fee, to the said David M. Thompson and Augustus F. Nagle their heirs and assigns forever: *Provided,* nevertheless, That if within the time in this act limited the conditions of the said contract be not performed as herein required, the said deed shall be void, and all the rights, title, interest, franchise, and estate conveyed thereby shall return to and rest in the State: *Provided,* further, however, That if the directors of the penitentiary shall fail to furnish the convicts, as required in section 6 of this act, the time within which the said conditions are to be performed shall be extended until such amount of labor has been furnished.

SEC. 12. That any contracts, liens, or encumbrances entered into with reference to said property, and the rights and franchises herein granted, shall be subject to the rights of and the obligation to, this State, as hereinbefore set forth, and any transfer, alienation, or sale thereof, whether voluntary or enforced, shall not deprive the State of or interfere with such rights and obligations, subject, nevertheless, to the condition that the work is completed pursuant to the for

going provisions in three years, and such additional time as is provided for herein.

SEC. 13. That the said Canal Commission, in executing in behalf of the State the covenant and agreement provided for in this act, may impose and require from the said parties such additional terms, guarantees, limitations, and restrictions as in their judgment may seem necessary and proper to protect the interests of the State in the labor of the convicts and in the penitentiary and canal property: *Provided*, That such additional terms shall not involve any additional liability on the part of the State nor any additional grant by the State of franchise, labor, or property.

SEC. 14. That the State hereby reserves the right to quarry rock from the quarry now open at the penitentiary for one year from the date of the said contract of sale and for such longer time as the said David M. Thompson and the said Augustus F. Nagle, or their assigns, may not need the site of the said quarry for the construction of the canal, and thereafter the State reserves the right to quarry rock at any point on the lands conveyed by the State to the said parties that shall not endanger the said canal and other works necessary to the development of the said water power; and it is hereby further declared that in making the said contract of sale the said parties shall be required to covenant on their part that the State, or any person or persons under her permit, shall, free of charge, quarry stone for the Charleston jetties or public buildings of the State at Columbia upon the lands known as the Kinsler tract, now secured to the said David M. Thompson and Augustus F. Nagle, their heirs and assigns.

Approved December 23, 1879.

Act of 1882.

"An Act to Athorize the Canal Commission to Transfer and Deliver to the Board of Directors of the South Carolina Penitentiary the Property Known as the Columbia Canal, with the Lands Held Therewith and Its Appurtenances, and to Develop the Same." (*17 Stat. S. C., 855.*)

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly and by the authority of the same, That the Canal Commission, appointed by and under an act entitled "An act to authorize and empower the appointment of a commission to control and direct the development and disposal of the property of the State, known as the Columbia Canal, and its appurtenances," approved March 12, 1878, be, and they are hereby, authorized and directed to transfer and deliver to the Board of Directors of the South Carolina penitentiary the property known as the Columbia Canal, together with the lands held therewith, and all and singular the rights, members and appurtenances thereto belonging, which was acquired under and by virtue of the act above entitled, and the contract by them entered into with Sullivan Fenner, in pursuance of said act, on the 25th day of September, A. D. 1878: Provided, That nothing herein contained shall authorize any action by the Canal Commission until a release has been executed to the State of all the right, title, and interest in the property above described, of Messrs. Thompson and Nagle, or of any other parties holding any interest therein.

SEC. 2. That the said Board of Directors are hereby au-

thorized and directed, on behalf of the State, to take into their possession the said property, with its appurtenances; and for the purpose of providing an adequate water power for the use of the penitentiary, and for the other purposes to be hereinafter named, they are authorized, empowered, and directed to improve and develop the same.

SEC. 3. That in order to improve and develop the power of the said canal, they are authorized to construct a dam across the Broad River, at or below the head of the present canal, as by future surveys may be deemed most expedient for the better development of the said water power; and in locating and constructing the said dam, they shall have the right to raise the waters in the Broad River to such a height as will give a head and fall of thirty feet at the south side of Gervais Street, at mean low water; with the right to build all necessary banks, abutments, and other structures, on both sides of said river, as may be required to complete the said dam; and the right is hereby given to widen and deepen the said canal throughout its length to the south side of Gervais Street, and to change the course thereof in such manner as they may consider necessary for the better development of the said water power: *Provided*, That the said canal shall be enlarged as to develop at least ten thousand horse power water power at the south side of Gervais Street: *Provided, further*, That suitable fishways for the free passage of fish be constructed in said dam.

SEC. 4. That the said Board of Directors shall have the right of way, and the same is hereby granted, in and along said canal for the construction and operation of the same; and if, in enlarging and developing the said canal, or in constructing the said dam, it becomes necessary to use the private

property of any person or corporation for that purpose, the said Board of Directors, for the sake of the public improvement contemplated in the construction of the said canal, and the better navigation of the said Broad and Congaree rivers, and the transportation of supplies to market, shall have the right to acquire such right of way in manner now provided by law.

SEC. 5. That in the construction of the said dam, and the enlargement of the said canal, and in the performance of all other work necessary to the full development of the said water power, the said Board of Directors are authorized to use and employ the labor of the Penitentiary convicts, using for that purpose so many as in their judgment may be necessary; and the said Board of Directors are further authorized to expend in the employment of skilled labor and engineers, and for the purchase of machinery and materials, such an amount of the income of the penitentiary, over and above amounts necessary for the support and maintenance of said institution as may, in their judgment, be necessary for the proper execution of said work, not to exceed the sum of ten thousand dollars in any one year.

SEC. 6. That the said Board of Directors are authorized to furnish to the city of Columbia, for the purpose of operating its waterworks and other purposes, five hundred horse power of water power; and to Sullivan Fenner under his contract with the Canal Commission, five hundred horse power of water power; and after reserving for the use of the penitentiary a power sufficient to meet the demands of its ordinary operations, and other industries conducted and carried on within its walls, they are further authorized, with the Comptroller General, on behalf of the State, to lease to other per-

sons or corporations water power upon such terms, and at such annual rental, per horse power, as in their judgment may be proper; and also to lease such mill sites along the line of the said canal, as may be owned by the State, upon such terms as may be deemed most advantageous to the interest of the State.

SEC. 7. And the said Board of Directors, and the Comptroller General, on behalf of the State, shall hold, manage, and control the said canal property, with its appurtenances, in connection with the South Carolina penitentiary, and shall make annually, to the General Assembly, a report of their actings and doings under this act, giving a detailed statement of their receipts and expenditures.

SEC. 8. The said Board of Directors shall be paid the same per diem and mileage for their services under this act as they may be allowed by law for penitentiary service, to be paid out of the income of the penitentiary.

SEC. 9. All acts and parts of acts inconsistent with this act are hereby repealed.

In the Senate House, the eighth day of February, in the year of our Lord one thousand eight hundred and eighty-two.

Approved February 9th, A. D. 1882.

Act of 1887.

"An Act to Incorporate the Board of Trustees of the Columbia Canal, to Transfer to the said Board the Columbia Canal with the Lands Now Held Therewith, and Its Appurtenances, and to Develop the Same." (*19 State S. C., 1090*).

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the Board of Directors of the South Carolina Penitentiary are hereby authorized, empowered and required to transfer, assign and release to the Board of Trustees of the Columbia Canal, hereinafter created and provided for, the property known as the Columbia Canal, together with the lands now held therewith, acquired under the acts of the General Assembly of this State with reference thereto or otherwise, all and singular the rights, members and appurtenances thereto belonging; and upon such transfer, assignment and release all the right, title and interest of the State of South Carolina in and to the said Columbia Canal and the lands now held therewith, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, together with all the appurtenances thereunto belonging, shall vest in the said Board of Trustees for the use and benefit of the city of Columbia, for the purposes hereinafter in this act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the said Board of Trustees and their assigns: *Provided*, That should the said canal not be com-

pleted to Gervais street within seven years from the passage of this act all the rights, powers and privileges guaranteed by this act shall cease, and the said property shall revert to the State.

SEC. 2. That the said Board of Trustees are hereby authorized and directed, for the development of the said canal, to take into their possession the said property with all its appurtenances; and for the purpose of navigation, for providing an adequate water power for the use of the penitentiary and for other purposes hereinafter named, they are hereby authorized, empowered and directed to improve and develop the same.

SEC. 3. That in order to improve and develop the power of the said canal for navigation, to furnish the city of Columbia with an adequate supply of water and other hydraulic purposes, they are authorized to construct a dam across Broad River at, above or below the head of the present canal, as, by survey already made or hereafter to be made, may be deemed advisable for the development of the said water power; and in locating and constructing the said dam, they shall have the right to raise the water in the Broad River to such a height as will give a head and fall of thirty-seven feet at the south side of Gervais street at mean low water; with the right to build all necessary banks, abutments and other structures on both sides of said river as may be required to complete the said dam; and the right is hereby given to widen and deepen the said canal throughout its length, from its source at Bull's Sluice to the Congaree River, at or near the mouth of Rocky Branch, on the general line of the canal, with such deflections therefrom as to them may seem expedient for the better development of the said water power: *Provided*, That the canal

be so enlarged as to carry a body of water 150 feet wide at the top of the water, 110 feet wide at the bottom and ten feet deep, and shall develop at least 10,000 horse power at the south side of Gervais street: *Provided, Further,* That a suitable fishway for the free passage of fish be constructed in the said dam.

SEC. 4. That the said Board of Trustees shall have the right of way, and the same is hereby granted, in and along said course of the canal, for the construction and operation of the same; if in enlarging and developing the said canal, or in constructing the said dam, it becomes necessary to use the private property of any person or corporation for that purpose, the said Board of Trustees, for the sake of the public improvement contemplated in the construction of the said canal, and the better navigation of the said Broad River and Congaree River, and the transportation of supplies to market, shall have the right to acquire such right of way in the manner now provided by law.

SEC. 5. That the said canal shall be opened for navigation free of charges by the said Board of Trustees, the State reserving the right to make such improvements in the canal as may be necessary to promote navigation through the canal more rapidly than can be accomplished by the board under this act: *Provided,* The said Board of Trustees or lessees of the water power are indemnified against any damages arising therefrom.

SEC. 6. That the said Board of Trustees are required to build only one bridge over the canal, to wit, one on Gervais street. That the said trustees or assigns shall not be required to build any draws or passageways through any other bridges across the canal, unless they voluntarily build addi-

tional bridges and draws or passageways therein shall become necessary for purposes of navigation; and if such draws and passageways or bridges other than those above provided for should be built they shall not be required to work the same except for their own benefit, nor shall they be required to attend on any locks which may be built.

SEC. 7. That the Board of Trustees shall, within two years from the ratification of this act, complete the said canal so as to carry a body of water 150 feet wide at the top, 110 feet wide at the bottom and ten feet deep, from the source of the canal down to Gervais street, and to furnish to the State, free of charge, on the line of the canal, 500 horse power of water power, to Sullivan Fenner or assigns 500 horse power of water power, under his contract with the Canal Commission, and to furnish the city of Columbia 500 horse power of water power at any point between the source of the canal and Gervais street the city may select; and shall, as soon as is practicable, complete the canal down to Congaree River a few yards above the mouth of Rocky Branch: *Provided*, That the right of the State to the free use of the said 500 horse power shall be absolute, and any mortgage, assignment or other transfer of the said canal by the said Board of Trustees of their assigns shall always be subject to this right.

SEC. 8. That in order to secure and aid the speedy completion of the canal, from its source to Gervais street, for furnishing the said water power to the State and to the city of Columbia, the Board of Directors of the South Carolina Penitentiary shall furnish to the order of the said Board of Trustees such convicts as may from time to time be in the penitentiary unemployed and not under contract and are now allowed by law to be employed or worked outside of the walls

of the penitentiary: *Provided,* That the convicts who shall be employed on the canal may at any time be leased by the Board of Directors and forthwith withdrawn from the work on the canal; that the employment of such convicts shall not interfere with the right of the Board of Directors in leasing and hiring convicts as is now or may hereafter be provided by law: *Provided, further,* That the said convicts shall be worked under the supervision of the superintendent of the penitentiary and work according to the plans adopted by the trustees.

SEC. 9. That to secure the speedy development of the said canal, the Board of Trustees shall have power to borrow money by issuing bonds to the amount of $200,000, bearing interest from date at the rate of six per cent per annum, to negotiate the same, and to use the proceeds for the construction of the said canal.

SEC. 10. That the said Board of Trustees shall have the power to mortgage the canal, with the land held therewith and all its appurtenances, to secure the payment of the principal and interest of the said bonds.

SEC. 11. That $100,000 of the said bonds shall be made payable the first day of January, A. D. 1918, and the remaining $100,000 of the said bonds shall be made payable on the first day of January, A. D. 1919. That one moiety or half of each class of bonds shall be of the denomination of $1,000 and one-half of the denomination of $500. Each shall have coupons attached, and shall bear interest at the rate of six per cent per annum. The first coupons on the bonds maturing January the first, 1918, to be payable July the first, 1888; the subsequent coupons shall be payable on the first day of January and July of each and every year

until the maturity of the said bonds; that the first coupons of the bonds maturing the first day of January, 1919, shall be made payable on the first day of July, 1889; the subsequent coupons shall be payable on the first day of January and July of each and every year until the maturity of these last mentioned bonds, to wit, January 1, 1919. Each and all of the said bonds shall be signed by the Chairman of the Board of Trustees and countersigned by the secretary and treasurer of the said Board. Each and every coupon shall have the facsimile of the written signature of the chairman and the secretary and treasurer imprinted thereon. On the back of each and every bond shall be printed the following words: "The city of Columbia, South Carolina, guarantees the prompt payment of each and every coupon attached to this bond," which shall be signed by the mayor of the city of Columbia and countersigned by the city clerk and treasurer and attested by the corporate seal of the said city; and the said bonds shall not be negotiable without this guarantee is signed by the said mayor and city clerk and treasurer.

SEC. 12. That the said Board of Trustees shall keep a registry of the bonds, signed, showing the number and amount of each bond and coupons attached. That when the bonds are signed by the mayor and city clerk and treasurer of the city of Columbia, they shall immediately thereafter be turned over to the said Board of Trustees of the Columbia Canal. That the said Board of Trustees shall have power to negotiate the sale of the bonds payable January 1, 1918, forthwith; and the funds arising therefrom shall be used for the development of the said canal. That after the first day of January, 1889, the said Board of

Trustees shall have the power to issue and sell the remaining $100,000 of bonds authorized to be issued under this Act, and devote the proceeds to the development of the said canal: *Provided*, The said Board shall not sell any bond for less than 90 per cent of its face value.

SEC. 13. That the said Board of Trustees of the Columbia Canal shall cause an accurate abstract of the contents of this Act to be printed on the back of each of the said bonds and on the face of each bond it shall be expressed that the same is issued under the authority of this Act.

SEC. 14. That the said Board of Trustees shall keep a correct registry of each bond sold, the number and amount of the bond, the party to whom sold and the amount received, and shall annually report to the city council a true abstract therefrom.

SEC. 15. That if any member of the said Board of Trustees shall fraudulently issue any of the said bonds, or fraudulently dispose of any money arising from the sale thereof, he shall be guilty of a misdemeanor, and upon conviction shall be punished by fine and imprisonment at the discretion of the court.

SEC. 16. That the said Board of Trustees may, at discretion, purchase or lease any land adjoining the Columbia Canal which they may think beneficial to the successful development of the canal, and may sell or lease any land on the canal, to be used for manufactories or to facilitate the navigation of the canal. That they may also during the years 1888 and 1889, at their discretion, contract to furnish water-power at three dollars or less a horse power per year, for ten years, to any party who will put up a factory of 10,000 spindles, or any factory which they may think

of equal importance for the development of the canal. That after the year 1889 no water power shall be sold for less than five dollars a horse power per annum.

SEC. 17. That the land, the canal and the appurtenances thereof, transferred to the said Board of Trustees of the Columbia Canal, and the bonds issued by them, shall be exempt from taxation, except for State purposes; that the buildings hereafter erected and the lands hereafter acquired shall be taxable, unless they are exempted under the general tax law of the State.

SEC. 18. That the said Board of Trustees shall, after the year 1893, pay the interest on the said bonds each and every year, if practicable for them to do so; and as soon thereafter as they shall be able, from the proceeds of the rental of water power of the canal, they shall create a sinking fund, in bonds issued by the said Board, which shall immediately be cancelled, or to be invested in bonds of the State of South Carolina: *Provided*, They can be purchased at a premium of 7 per cent or less; and as soon as practicable the Board of Trustees shall pay all the bonds issued by the said Board, and then transfer the Columbia Canal and its appurtenances to the city of Columbia: *Provided, further*, That the city of Columbia may at any time, with the consent of the bondholders and other creditors of the said Board, take possession of the Columbia Canal, with all its appurtenances, upon assuming all the liabilities of the said Board and indemnifying its members from loss.

SEC. 19. To insure the prompt development of the said canal, and to enable the Board of Trustees to offer inducements for the speedy erection of factories on the canal below Gervais Street, the said trustees are authorized and required,

before they shall employ any of the proceeds of said bonds in developing the canal below Gervais Street, to secure, by contract or purchase, and control, land on the canal south of Gervais Street, with frontage sufficient for at least two mill sites suitable for the erection of factories of 20,000 spindles each.

SEC. 20. That the said Board of Trustees of the Columbia Canal shall consist of five members. The mayor shall be a member ex officio; the mayor and aldermen of the city of Columbia shall elect the other four, one from the city council, the other three from the citizens of Columbia at large. The mayor and aldermen elected shall hold their membership during the time they are members of the city council; the other three shall hold their office for four years. The members of the Board of Trustees shall be elected by the mayor and aldermen of the city of Columbia at the meeting of the city council which is held to declare the result of the vote of the legal voters of the city of Columbia authorizing the mayor and aldermen to guarantee the payment of the interest on the bonds to be issued by the said Board of Trustees or as soon thereafter as practicable.

SEC. 21. The said Board of Trustees shall be, and is hereby, declared a body politic and corporate. Its corporate name shall be "Board of Trustees of the Columbia Canal." Its officers shall be a chairman and a secretary and treasurer. It shall have a corporate seal; may make and enforce its by-laws for its government; may purchase, sell or lease lands adjoining the canal useful for the purposes of the canal; may sell or lease the water power of the canal, subject to such rules and regulations as it shall prescribe, having first provided for the State with 500 horse power of water power

at the penitentiary and 500 horse power of water power for Sullivan Fenner or his assigns, and 500 horse power of water power for the city of Columbia; may sue and be sued, plead or be impleaded, under their corporate name, and exercise such other powers as are hereinbefore granted, and shall fix such compensation for the services of the secretary and treasurer as they may deem proper.

SEC. 22. That all vacancies caused in the Board of Trustees by death or from other causes shall be supplied by election by said board, except in the case of the Mayor and the Aldermen elected by the City Council, who hold their places by virtue of their office.

SEC. 23. The said Board of Trustees, as soon as they have fully developed the said canal, and secured the payment of the debts contracted by them in its development, shall turn over the canal with all its appurtenances to the city of Columbia.

SEC. 24. That this act shall be of force for thirty-one years and shall go into effect immediately upon its passage.

In the Senate House, the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

Second Act of 1887.

"*An Act to Authorize the City of Columbia to Guarantee and Pay the Coupons on Bonds to be Issued by the 'Board of Trustees of the Columbia Canal,' under an Act Entitled 'An Act to Incorporate the Board of Trustees of the Columbia Canal to Transfer to the Said Board the Canal, With the Land Now Held Therewith and Its Appurtenances, and to Develop the Same.'*" (19 *Stat. S. C.*, 1097.)

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That inasmuch as the completion of the Columbia Canal will secure to the city of Columbia the navigation of the Congaree and Broad rivers, give it greater facilities to increase her water supply, to establish electric lights, and for other municipal purposes, the Mayor and Aldermen of said city, upon the passage of an act entitled "An Act to incorporate the Board of Trustees of the Columbia Canal, to transfer to the said board the canal, with the land now held therewith and its appurtenances, and to develop the same," shall order an election for the legal voters of the city of Columbia, to be held within two weeks after the approval of the said act, or as soon thereafter as practicable, to determine whether or not the city of Columbia shall guarantee and pay the coupons on the bonds to be issued by the Board of Trustees of the Columbia Canal as they mature.

SEC. 2. That the said election shall be held in the different wards of the city under the direction of the Mayor and

Aldermen. Each vote deposited by legal voters of the city shall have written or printed thereon "Guarantee" or "No Guarantee."

SEC. 3. That the managers of the polls in each ward shall report to the City Council the number of legal votes cast for "Guarantee" and for "No Guarantee," and the majority of the votes cast will determine the question, and the Mayor and Aldermen shall declare the election: *Provided, however,* That it shall require a majority of all the qualified electors residing within the corporate limits of the said city of Columbia.

SEC. 4. That if the Mayor and Aldermen shall publish the election that a majority of the votes of the legal voters of Columbia which were cast at the election ordered by them was in favor of "Guarantee," then, at the same meeting of the City Council, which publishes the election, or as soon thereafter as it is practicable, the Mayor and Aldermen shall be authorized and required to levy such a tax on the real and personal property assessed for taxation in the city of Columbia as may be necessary to pay the coupons, to be guaranteed by the city, maturing on the bonds to be issued by the "Board of Trustees of the Columbia Canal," for the year A. D. 1888, and shall annually thereafter levy a tax sufficient to pay the coupons as they mature on said bonds, and shall pay the same: *Provided,* That after the year 1893 the Board of Trustees of the Columbia Canal shall pay over semiannually to the city of Columbia all the net increase derived from the sale, leasing or renting of water power, or such other sources, not exceeding in any one year the amount of the coupons maturing: *Provided, further,* That the amount of such levy, when added to the levy for the

current expenses of the city and for the interest on the bonded debt of the city, shall not exceed two per cent on the assessed value of the property in the city in any one year.

SEC. 5. That as soon after the publishing of the election of the legal voters that the majority of ~~the~~ votes were cast for "Guarantee," as is practicable, the Mayor and Aldermen shall elect four members of the Trustees of the Columbia Canal, one from the Aldermen and three from the citizens at large.

SEC. 6. That the said Mayor and the city clerk and treasurer shall, as soon as practicable thereafter, sign the guarantee on the back of each bond of the following words: "The city of Columbia, South Carolina, guarantees the prompt payment of each and every coupon attached to this bond," which may be presented to them for signature by the said "Board of Trustees of the Columbia Canal," and shall attest their signatures by the corporate seal of the city of Columbia, and as soon as signed and sealed to return the same to the said Board of Trustees of the Columbia Canal.

SEC. 7. That the Mayor and Aldermen shall keep a registry of all bonds which the Mayor and city clerk and treasurer have signed as guaranteeing the coupons, giving the number and denominations of bonds, and the number and amount of the coupons; that the said coupons as they mature shall be payable at the office of the city clerk and treasurer, in the city of Columbia, and shall be receivable for taxes due the city, except for water rents.

SEC. 8. That this act shall be of force for thirty-one years and shall go into effect immediately upon its passage.

In the Senate House the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

Act of 1890.

"An Act to Amend an Act Entitled 'An Act to Incorcorpate the Board of Trustees of the Columbia Canal, to Transfer to the said Board the Canal, with the Lands Now Held Therewith and its Appurtenances, and to Develop the Same,' Approved December 24, 1887." (20 *Stat. S. C.*, 967.)

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same; That section 3 of an act entitled "An act to incorporate the Board of Trustees of the Columbia Canal, to transfer to the said Board the Columbia Canal, with the lands now held therewith and its appurtenances, and to develop the same," approved December 24, 1887, be, and is hereby, amended so as to read as follows:

SEC. 3. That in order to improve and develop the power of said canal for navigation, to furnish the city of Columbia with an adequate supply of water and other hydraulic purposes, they are authorized to construct a dam across Broad River at, above or below the head of the present canal, as by survey already made or hereafter to be made may be deemed advisable for the development of the said water power, and in locating and constructing the said dam they shall have the right to raise the water in Broad River to such a height as will give a head and fall of thirty-seven feet

at the south side of Gervais street at mean low water; with the right to build all necessary banks, abutments, and other structures on both sides of said river as may be required to complete the said canal; and the right is hereby given to widen and deepen the said canal throughout its length from its source at Bull's Sluice to the Congaree River, at or near the mouth of Rocky Branch, on the general line of the canal, with such deflections therefrom as to them may seem expedient for the better development of the said water power: *Provided*, That the canal be so enlarged as to carry a body of water one hundred and fifty feet wide at the top of the water, one hundred and ten feet wide at the bottom, and ten feet deep, and shall develop at least ten thousand horse power at the south side of Gervais street: *Provided further*, That for a distance of about fifty-three chains southerly from the south line of Gervais street the minimum dimensions of said canal shall be one hundred and fifty feet width at normal level of the surface of the water in the canal when completed, one hundred and ten feet width at the bottom and ten feet depth; thence southerly for fourteen chains the canal shall be uniformly diminished so as to have the minimum dimensions at the southerly end of said fourteen chains of one hundred and twenty feet width at normal level of the surface of the water in the canal when completed, eighty feet width at the bottom and ten feet depth, and these latter minimum dimensions shall continue to the terminus of the canal, a distance of about sixty-seven chains: *Provided, further*, That suitable fishways for the free passage of fish be constructed in the said dam.

SEC. 2. That section 23 of said act be, and the same is hereby, amended so as to read as follows:

SEC. 23. That the said Board of Trustees, as soon as they have fully developed the said canal and secured the payment of the debts contracted by them in its development, *they* shall turn over the canal, with all its appurtenances, to the city of Columbia. But the said Board of Trustees shall have full power and authority, before the said canal has been fully developed and completed and turned over to the city of Columbia, to sell, alienate and transfer the same and all its appurtenances, the lands held therewith, and all the rights and franchises conferred by this act on said Board of Trustees, to any person or corporation, subject, however, to all the duties and liabilities imposed thereby, and subject to all contracts, liabilities and obligations made and entered into by said Board prior to such sale and transfer, upon the approval and consent of nine members of the City Council of the city of Columbia, and before such sale, alienation and transfer is made, thirty days' notice of the offer to purchase and the terms thereof shall be given to the council of the city of Columbia.

Approved December 24, A. D. 1890.

Act of 1892.

An Act to Ratify and Confirm the Contract Made and Entered into by and Between the Board of Directors of the South Carolina Penitentiary and the Columbia Electric Street Railway, Light and Power Company, for the Development of the Five Hundred Horse Power of Water Power Reserved by the State of South Carolina for the Use of the South Carolina Penitentiary, Along the Line of the Columbia Canal. (21 Stat. S. C., 94.)

Whereas, at a regular meeting of the Board of Directors of the South Carolina Penitentiary, held in the city of Columbia on the 17th day of May, A. D. 1892, a resolution was unanimously adopted authorizing and instructing the Superintendent of the South Carolina Penitentiary, on behalf of the said Board, to enter into a contract with the Columbia Electrict Street Railway, Light and Power Company for the development and utilization of the five hundred horse power of water power reserved by the State of South Carolina for the use of the South Carolina Penitentiary, along the line of the Columbia Canal; and, whereas, the Superintendent of the South Carolina Penitentiary, pursuant to the said resolution of the said Board, did, on the 26th day of May, A. D. 1892, execute a contract with the said the Columbia Electric Street Railway, Light and Power Company, for the development and utilization of the said water power upon certain terms expressed in the said contract; and, whereas, the said the Columbia Electric Street Railway, Light and Power Company, pursuant to the said contract, has erected extensive mason work, and has placed

thereon water wheels for the development of the said five hundred horse power of water power, and erected thereon all necessary buildings, shafting, etc., with all necessary water wheels, gateways, and other structure for the complete development and use of the said water power, and has in all other respects fully complied with the terms of the said contract; Now, therefore,

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the said contract by and between the Board of Directors of the South Carolina Penitentiary, and the Columbia Electric Street Railway, Light and Power Company, for the development of the said water power, be, and the same is hereby ratified and confirmed, subject, however, to all of the conditions, limitations and restrictions in the said contract provided.

Approved December 24th, A. D. 1892.

Resolution of 1911.

(See H. J. 1911, p. 996; S. J. 1911, p. 605; also quoted in 90 S. C. at 571.)

JANUARY 31:

H. 554.—Mr. REMBERT: A Concurrent Resolution providing for an extension of time for the city of Columbia to comply with the order in the case of State *v.* City of Columbia.

WHEREAS, The Supreme Court of the State of South Carolina has passed an order requiring the city of Columbia to

move from across the Columbia Canal the water mains and bridge there erected by it by the 5th of June, 1911; and

WHEREAS, The removal of said bridge and mains will be at great expense, and the whole water supply of the city of Columbia is dependent thereon; and

WHEREAS, That said city does not question the right of the State to require it to remove the said bridge and mains at any time it see fit so to do, but is desirous of being allowed to let the bridge and mains remain until such time as it is shown that they are an actual obstruction to real navigation: and

WHEREAS, It is appears that even if the city of Columbia now removed the said bridge and mains there are other obstructions in the said canal which would prevent navigation, and against which no proceedings have been taken by the State of South Carolina or other parties; therefore

Be it resolved by the House of Representatives, the Senate concurring:

SECTION 1. That the Attorney-General be, and he is hereby, authorized and directed to consent to an order of the Supreme Court of the State of South Carolina extending the time for the removal of said bridge and mains to such time as all other obstructions to navigation shall be removed from the said canal and there appears, on affidavits filed with the Supreme Court, that actual navigation on said canal is hindered by the said bridge and mains.

On motion of Mr. REMBERT, the Concurrent Resolution was referred to a special committee of five, to be appointed by the Chair.

The SPEAKER appointed on that Committee, Messrs. Mower, Gary, Stevens, Osborne and Rembert.

The Senate returned to this House, with concurrence:

January 31: Report of Committee.

February 1: Agreed to.

February 15: Returned to House by Senate with amendments, which were agreed to.

Act of 1912.

"An Act to Authorize and Empower Columbia Railway, Gas and Electric Company to Construct and Maintain a Dam In and Across the Congaree River and Columbia Canal at or Near the Confluence of the Broad and Saluda Rivers, for the Purposes Therein Mentioned." (27 Stat. S. C., 779.)

SECTION 1. Be it enacted by the General Assembly of the State of South Carolina, That Columbia Railway, Gas and Electric Company be, and it is hereby, authorized and empowered to construct and maintain a dam of stone or such other material as said company may deem proper, for the purpose of developing, transmitting and selling electrical power for the use of public and municipal service, and for industrial and private concerns in the city of Columbia and State of South Carolina, in and across the Congaree River and the Columbia Canal, at or near the confluence of the Broad and Saluda Rivers, and about seventeen hundred feet north of the waterworks plant of the city of Columbia, the height of which shall be not more than forty-five feet above

the present level of the river bed, and which shall raise the water in said canal and river to a height of ten feet above the present level of the water in said canal, together with the right to build and construct all necessary banks, abutments and other structures, on both sides of said river and canal, as may be required to complete the same, and for its use for the purposes herein mentioned, and may enlarge and raise the present embankments of the canal to such height as may be necessary and sufficient to protect the said city waterworks plant and the other property along the line of the canal against overflow or damage by reason of the construction and maintenance of said dam across said river and canal. The said company shall have the right, power and privilege to acquire, by purchase or by condemnation proceedings, all lands which may be overflowed or damaged by the construction and maintenance of such dam as shall be constructed and maintained under the power and authority conferred by this act: *Provided*, That this act shall be without prejudice to the rights of any person or corporation aggrieved or damaged by the construction and maintenance of the said dam: *Provided*, That all the rights, powers and privileges herein granted shall cease and be null and void unless the construction of said dam authorized herein be completed within five years from the date of the passage of this act unless prevented by Porvidential cause: *Provided, further*, That in the construction and maintenance of such dam suitable fishways shall be made and maintained, and every forebay or tailrace shall be protected by some suitable device to prevent fish going into the water wheels.

SEC. 2. That in the construction of the said dam the said Columbia Railway, Gas and Electric Company shall cause to

be constructed near the gateways on the canal in said dam a lock of the dimensions of not less than twenty-two feet in width, 110 feet in length and six feet in depth for the purposes of navigation of said rivers and to be used for such purposes.

SEC. 3. That the power of condemnation of lands which may be necessary for use in the construction of said dam and its abutments, and of the necessary structures and buildings for the development of the power and its utilization hereinbefore stated, and of such lands as may be subject to be overflowed or damaged by reason of the backing of said water, shall be exercised in the same manner as now provided by the law of this State for the condemnation of lands for railway, canal and turnpike purposes: *Provided,* That the right of condemnation shall not be exercised until the said company shall have acquired by purchase seven-elevenths of all lands that may be overflowed by reason of construction and maintenance of said dam as shown by the maps and plans of the engineers of said company.

SEC. 4. That before the said Columbia Railway, Gas and Electric Company shall commence the construction of the dam across the Congaree River and the Columbia Canal, herein authorized to be constructed, it shall enter into an agreement with the said city of Columbia, through its City Council or other municipal power having control and jurisdiction thereof, upon satisfactory terms to the said city authority or authorities, for the protection and safe guarding of the water supply of the said city from the Congaree or Saluda rivers, and of the waterworks plant of said city, against any damage, pollution, injurious effect or other danger whatsoever which said city authorities may deem and consider would

arise from the construction of the dam herein authorized, and the enlargement of the embankments of the canal for the development contemplated by the construction of said dam, and for the payment of all expenses incurred by the city in adjusting its water plant to the proper utilization of the water supply to which it is entitled made necessary by the construction of the new dam.

SEC. 5. That the exemption from taxation authorized by section 17 of the act entitled "An act to incorporate the Board of Trustees of the Columbia Canal, to transfer to the said Board the Columbia Canal with the lands now held therewith, and its appurtenances, and to develop the same," approved December 24, 1887, shall have no application to the dam, buildings, works and structures herein authorized to be made by the Columbia Railway, Gas and Electric Company, and its undertaking to construct said dam and works aforesaid shall be deemed and taken to be an acceptance of the terms and conditions contained in this section, and all property which may be acquired other than that expressly exempted, shall be subject to taxation, for all State, county and municipal purposes.

SEC. 6. That nothing contained in this act shall be taken or construed to relieve said company from any of the obligations and liabilities imposed by the provisions of an act to incorporate the Board of Trustees of the Columbia Canal, to transfer to the said Board the Columbia Canal with the lands now held therewith, and its appurtenances, and to develop the same, approved December 24th, 1887, and all acts amendatory thereof: *Provided,* That if the said company shall accept the franchises, powers and privileges herein given, it shall be deemed and taken thereby to have contracted, cove-

nanted and agreed with the State, that it and its successors and assigns will complete the Columbia Canal in accordance with the acts of the General Assembly heretofore passed referring to said completion, within such time as any court of competent jurisdiction shall, at suit to be brought by the Attorney General, decide to be reasonable or practicable within the meaning of said previous acts, and if it shall fail to complete said canal within such time as shall be fixed and determined, that it will then pay to the State such sum in lieu of such compensation as may be determined to be reasonable in an action to be brought therefor by the Attorney General, and he is hereby authorized and directed to bring the action herein referred to, and the said company shall file with the Secretary of State, within one year after the passage of this act, under the hand and seal of its president and secretary and treasurer, its acceptance or rejection of the provisions of this act, otherwise the powers herein granted shall cease and be utterly null and void. That said corporation shall have no power or authority to sell, merge, pool or in any other manner whatsoever dispose of the rights, privileges or franchise herein granted or conferred, without first obtaining permission from the General Assembly of the State of South Carolina, after furnishing full facts as to the proposed sale, merger, pool or other manner of proposed disposition. Anything in this act inconsistent with the provisions of this section are hereby made expressly subject to the terms of this section: *Provided*, This shall not apply to any mortgage made to raise money to build said dam.

SEC. 7. That all acts and parts of acts inconsistent with the provisions hereof be, and the same are hereby, repealed.

Approved the 26th day of February, A. D. 1912.

Act of 1914.

"An Act Requiring the City of Columbia to Continue to Maintain the Bridge Erected by Said City Across the Columbia Canal Until Construction Work Begins for the Completion of Said Canal." (28 *Stat. S. C.*, 881.)

SECTION 1. City of Columbia Required to Maintain Bridge Across Canal Until Work Begins for Completion of Canal.—Be it enacted by the General Assembly of the State of South Carolina, That the bridge heretofore erected by the city of Columbia over the Columbia Canal, and used by the citizens of Columbia as a passageway across said canal, and also used by the city of Columbia for the purpose of supporting certain water mains which carry the water supply of said city from the Broad River to the city water plant, may be maintained by the city of Columbia to and for the purpose of a passageway for the citizens of Columbia, and also for the purpose of carrying the water pipes of said city, until such time as construction work for the completion of said canal be actually begun, or until this act shall be repealed or modified.

Approved the 28th day of February, A. D. 1914.

Act of 1917.

"An Act to Declare That the Columbia Canal, and Its Appurtenances, and the Interest of the State in and to the Columbia Canal, Authorized to be Transferred under an Act entitled 'An Act to Incorporate the Board of Trustees of the Columbia Canal, to Transfer to the Said Board the Columbia Canal, With the Lands Now Held Therewith, and Its Appurtenances, and to Develop the Same,' Approved December 24, 1887, and Acts Supplemental or Amendatory Thereof, Shall Revert to the State by Reason of and on Account of the Violation of the Conditions Contained in Said Acts, and to Provide Provisions Relating to the Operation, Management, Control, Disposal or Sale of said Canal." (30 *Stat. S. C.*, 348.)

Whereas, the act of the General Assembly of the State of South Carolina, entitled "an act to incorporate the Board of Trustees of the Columbia Canal, to transfer to the said board the Columbia Canal with the lands now held therewith, and its appurtenances, and to develop the same," did authorize the transfer, assignment and release of all the right, title, and interest of the State of South Carolina in and to the said Columbia Canal and the lands then held therewith, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, together with all the appurtenances thereunto belonging, to a Board of Trustees, incorporated by said act, for the use and benefit of the city of Columbia, for the purposes in said act specifically set forth, and subject to the performance of the conditions and limitations therein prescribed on the part of

the said Board of Trustees and their assigns, and did further provide that the canal, when enlarged, as prescribed in said act, shall develop at least ten thousand (10,000) horse power at the south side of Gervais Street, and did further provide that the said canal shall be open for navigation free of charge by the said Board of Trustees, the State reserving the right to make such improvements in the canal as may be necessary to make navigation of said canal more rapid than can be accomplished by the board under this act, and that, by the provisions of said act, the said Board of Trustees, within two years from the ratification of the act, should complete the said canal so as to carry a body of water one hundred and fifty (150) feet wide at the top, one hundred and ten (110) feet wide at the bottom and ten (10) feet deep, from the source of the canal down to Gervais street, and shall, as soon as practicable, complete the canal down to Congaree River a few yards above the mouth of Rocky Branch: *Provided*, however, that the right of the State to the free use of the five hundred (500) horse power of water power shall be absolute, and any mortgage, assignment, or other transfer of the said canal by the said Board of Trustees or their assigns, shall always be subject to this right, and further, authorized the Board of Trustees to issue bonds to the amount of two hundred thousand ($200,000.00) dollars, bearing a certain rate of interest, and to use the proceeds for the construction of the said canal, more particularly set forth in said act, and,

Whereas, in other particulars there are conditions prescribed by said act for the benefit of the State and her citizens enjoined, and,

Whereas, it now appears that notwithstanding the laps

of time, ~~and~~ from December 24, 1887, to the present day, the Board of Trustees of the Columbia Canal, or its assigns, have failed and neglected to fulfill the conditions hereinabove set forth, and refused to perform the said conditions, and have further neglected to keep in proper repair and open for navigation the said canal, and to remove the damage and injury that is being committed to the property so authorized to be transferred by the General Assembly of the State of South Carolina, under the aforesaid act, now,

SECTION 1. Conditions of Act Not Complied With.—Title to Canal Reverts to State.—Be it enacted by the General Assembly of the State of South Carolina, that the conditions of the act of the General Assembly hereinabove mentioned, and the acts supplemental or amendatory thereof, have not been complied with, but that the same have been disregarded, and by reason thereof the right, title, and interest of the State to the said Columbia Canal, its appurtenances and the lands held therewith, so transferred by virtue of said acts, have been forfeited and reverted to the State.

SEC. 2. Canal Commission—Powers.—That the Attorney General and the chairmen of the Judiciary Committees of the Senate and House of Representatives, the chairman of the Finance Committee of the Senate and the chairman of the Ways and Means Committee of the House of Representatives, be, and they are hereby, empowered and authorized and directed, or a majority of them, ninety (90) days after the approval of this act, to make such re-entry for and in behalf of the State as may be necessary and proper under the circumstances, and to take such steps as may be

lawful and proper in the premises to obtain possession and control of the property of the said Columbia Canal, its appurtenances and the lands held therewith, and the improvements placed thereon by those in possession, which have become a part and parcel of said canal, unless the claimants enter into arrangements satisfactory to said officers as herein provided, and, further, to take such possession, control, and direction of the development of the water power originally contemplated by said acts, and to dispose of the same, in such way as they may deem advisable and proper, for the interest of the State.

SEC. 3. Procedure by Attorney General.—That the Attorney General, for and in behalf of the State, do at the time provided for the re-entry or thereafter, commence such proceedings as he may deem proper and advisable, in any of the courts of this State, to assert the right of the State in and to said canal property, as hereinabove described, and the structures and improvements placed thereon, which have become a part of said canal, and for the further protection of said canal from injury and neglect, for keeping the same in proper condition and repair, and, further, that he is empowered and authorized to bring such action for such damages as the State of South Carolina has suffered by reason of the failure of the assignees and conveyees of the Board of Trustees of said property to perform the conditions contained in said acts hereinabove mentioned, and in the several conveyances thereto made to them from the said Board of Trustees, and enjoined and provided for in said acts; such action or actions so brought by him, for and in behalf of the State, shall not be any bar to any action that may be brought by any individual or corporation for any special

damages done or sustained by him or it; that such action or actions so brought by the Attorney General, for and in behalf of the State, and its citizens, for violation of or injury to the rights of said State, and for the violation of the liabilities and conditions prescribed by said acts, incurred by the grantees of said canal property, as herein described, shall be exclusive, and the said Attorney General may employ such counsel to assist him in carrying out the provisions of this act, with regard to bringing such action, or any other action, contemplated by this act, as he may deem advisable, such counsel to be subject to the approval of a majority of the officers mentioned in section 2, and that an appropriation therefor be made in the General Appropriation Act, as a part of the current expenses of the Government.

SEC. 4. Compensation.—That the said officers shall, for their services, be paid, for the actual time engaged in attending to the duties prescribed by this act, their expenses and a per diem which shall equal that of a member of the General Assembly in attending upon their meetings.

SEC. 5. Officers May Make Agreement.—That the said Attorney General, and other officers herein mentioned, who are authorized to take charge of and control of said canal property, be, and they are hereby, given full power and authority to enter into any such arrangements or agreements with the parties claiming to have any right, title, or interest in the premises, as they may deem advisable and proper to protect the interest of the State, the same however, to be made within ninety (90) days from the approval of this Act, and report the same to the General Assembly for its approval at its next regular session.

SEC. 6. Arrangements which May be Made.—That the

officers hereinabove mentioned, for the protection of the interest of the State, may receive and make such propositions for the disposal of said canal, and its appurtenances and improvements, and the lands held therewith, or for the completion thereof by anyone taking over or holding the same, according to the plans heretofore specified, or upon such modified plans as they deem advisable; and, for the purpose of extending and completing the said canal to insure adequate connection with and into the Congaree River for the purpose of navigation, as well as the development of power, they may employ such competent engineers as they may deem advisable for their information and action, with regard to the management and disposal of said canal; and, further, that they may enter into such arrangements with the mortgage bondholders of the Columbia Canal as to protect the interest of the State and the interest of said bondholders; and may enter into such agreements or arrangements, or take such action as they may deem advisable with regard thereto, which shall not be in conflict with any contractual obligations of the State made by the Acts heretofore passed with regard to the issuing of said bonds and the mortgaging of said property.

SEC. 7. Negotiations with U. S. as to Nitrate Fixation Plant.—That the officers provided for in section 2 hereof, or a majority of them, are hereby empowered and authorized to enter into and conclude negotiations with the United States Government that will fully insure and protect the navigability of the said Columbia Canal from the Congaree River to the Broad River, and should such arrangements be consummated, are further authorized, empowered and directed to convey to the United States Government, all rights

equities, title and interest of every nature whatsoever in the said property or properties which the State of South Carolina owns, and upon such terms as they may deem proper and the agreement on the part of the United States Government to locate, maintain and operate on the Congaree River in or near Columbia, a Federal nitrogen fixation plant under the terms of the Federal act, known as the Smith Nitrate Bill, and the further agreement by the United States Government to protect and conserve the navigability of the said canal in conformity with the terms of said agreement.

Sec. 8. Action Hereunder to Have Precedence.—That on account of the emergency which has arisen with regard to the present condition of said canal, and of the failure of the present owners, or those claiming to own the same, all action or actions, which are hereby authorized to be brought by the Attorney General in any Court of this State, shall take precedence of all others, and shall be expedited as far as it is practicable in the Courts of this State.

Sec. 9. No Bond Required—Inconsistent Acts Repealed.—That no bond shall be required of the State in any action, either at law or in equity, in its behalf, as any preliminary for obtaining an injunction or any other procedure. That all Acts and parts of Acts inconsistent with this provision be, and the same are hereby, repealed.

Sec. 10. Immediately Effective.—That this Act shall take effect immediately upon its approval by the Governor, or in accordance with the provisions of the Constitution.

Approved the twelfth day of March, A. D. 1917.

Act of 1918.

An Act to Provide for an Investigation of the Management, Disposition, and Control of the Columbia Canal, Its Income and the Connection of Its Arrangements, the Conveyee of said Property May Have Had, or Now Have With Other Power and Light Producing Properties, or the Officer or Agents Thereof. (30 Stat. S. C., 1118.)

Whereas, a committee was appointed under "An act to declare that the Columbia Canal and its appurtenances, and the interest of the State in and through the Columbia Canal, authorized to be transferred under an act entitled 'An act to incorporate the Board of Trustees of the Columbia Canal, to transfer to the said board the Columbia Canal, with the lands now held therewith and its appurtenances, and to develop the same,' approved December 24, 1887, and acts supplemental or amendatory thereof, shall revert to the State by reason of and on account of the violation and the conditions contained in said acts, to provide provisions relating to the operation, management, control, disposal or sale of said canal," approved March 12th, 1917, and said committee has reported that it is desirable that power be conferred upon it to investigate and inquire into all matters and things done by the present claimants and their predecessors, conveyees of the Board of Trustees of said property, as to the management, control, and disposition thereof, and the disposition of the rents, income and revenue derived from said property, and that it is desirable to inquire into all connections, relationship, and association of the said conveyees, their officers and agents of said property may have had or now have with any

and all corporations and persons, their officers and agents operating, owning or controlling any other corporation engaged in production of power or light; now,

SECTION 1. Committee to Investigate.—Be it enacted by the General Assembly of the State of South Carolina, That the committee heretofore appointed by and under the terms of the Act approved March 12th, 1917, or a majority of said committee, or any other committee or committees that may be hereafter appointed for carrying out the purposes of said act, have authority and power, and it is hereby required of said committee to inquire into fully and investigate all the acts and doings of the present claimant of said property and its officers and agents in relation to the Columbia Canal and the lands held therewith and its appurtenances, and for such purposes as are mentioned in the preamble of this act and also to inquire into and investigate all matters and things that may have been done by this claimant, its officers and agents, with respect to or in connection with any and all other corporations having hydro-electric plants operating or doing business in this State, and the effect thereof upon said canal property and other rights of the State, and report the same to the Attorney-General for his action under the laws of this State, and to the General Assembly; that said committee shall make a similar inquiry and investigation into the acts and doings of other conveyees of said property of the Board of Trustees of the Columbia Canal.

SECTION 2. Committee May Summon and Examine Witnesses.—That said committee be, and are hereby, authorized and empowered to call before them by summons or notice in such form as the committee may adopt such person or persons as the committee may deem proper and to require such

person or persons to answer upon oath any and all questions that the committee may deem relevant and may propound to him or them, and upon the failure or refusal of such person or persons to obey such summons or notice or to answer such question or questions, such person or persons shall be deemed to be in contempt of the authority of said committee, and may be imprisoned upon the order of said committee in the common jail to be held until he or they shall comply with the order of said committee: *Provided,* That all sheriffs and Constables are required to enforce all orders of the said committee.

SECTION 3. Committee May Require Production of Books and Papers.—The said committee be, and the same is hereby, authorized to send for and to require the production of any and all books, papers, or other documents or writings which may be deemed relevant to any investigation, and to require said person or persons in custody or possession of said papers to produce the same before the said committee, and any person or persons who shall fail or refuse to act on the order or notice of said committee to produce said books, papers, or other documents or writings, shall be deemed guilty of contempt of said committee and be punished as provided in section 2.

SECTION 4. Committee May Administer Oaths—False Swearing Perjury—Present Committee to Continue in Office.—Said committee shall have power to administer necessary oaths, and any person who shall, after being sworn before said committee, swear falsely, shall be deemed guilty of perjury, and, upon conviction, shall be punished as provided by law. The present committee shall remain in office until the final determination of all controversies now

ending which involve the rights of the State in the said
olumbia Canal.

SECTION 5. Act Effective on Approval.—This act shall
ke effect and be of force immediately upon its approval
the governor.

Approved the 28th day of March, A. D. 1918.

(7373)

Office Supreme Court, U. S.
FILED
JAN 26 1923
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 297

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, PLAINTIFF IN ERROR,

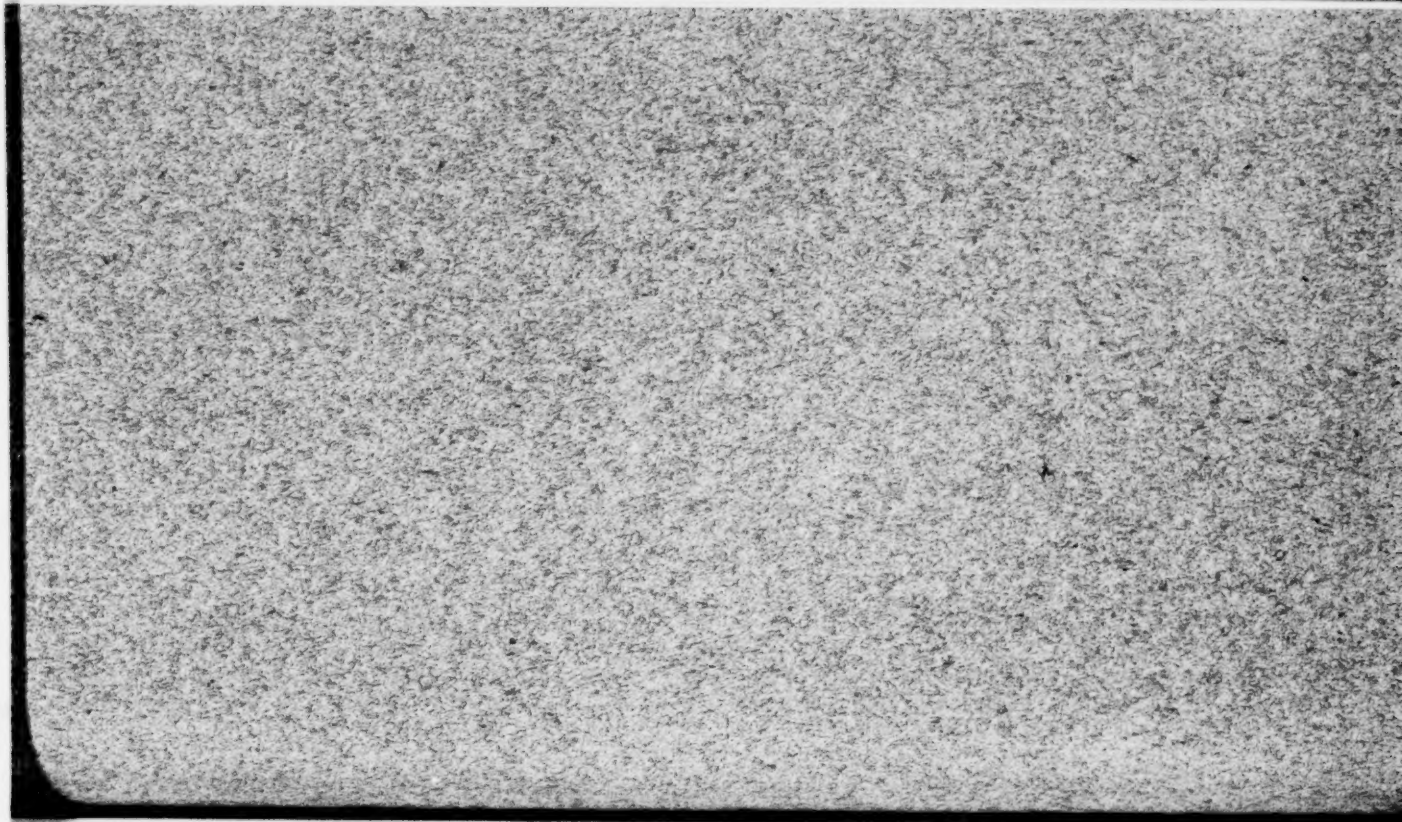
vs.

THE STATE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR DEFENDANT IN ERROR.

S. M. WOLFE,
Attorney General;
J. FRASER LYON,
Of Counsel,
Attorneys for Defendant in Error.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 800.

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR DEFENDANT IN ERROR.

Preliminary Statement.

This writ of error brings up a final judgment of the Supreme Court of South Carolina in a case where the State of South Carolina was plaintiff and Columbia Railway Gas and Electric Company was defendant.

The action was commenced in the Court of Common Pleas for Richland County on December 11, 1917. It was

brought for and on behalf of the State by her Attorney-General, as provided by section 3 of the Act of 1917 (*infra*, p. 124) and as alleged in paragraph 22 of the complaint (p. 13), to recover possession of the premises (Columbia canal, etc.,) and for such income and rentals as the defendant may have received from withholding the same since the 20th day of August, 1917, because defendant (plaintiff in error) and its assignors and predecessors in possession had failed and refused to fulfill the conditions contained in the act of the Legislature of South Carolina of 1887 and 1890 (*infra*, pp. 104, 115) and the conveyances thereunder.

Among the conditions set forth in the Act of 1887 and alleged in the complaint as not having been complied with and as grounds for forfeiture were that the canal should be enlarged to certain dimensions; develop 10,000 horse-power of water power at the south side of Gervais street; be kept open for navigation free of charge and shall as soon as is practicable be completed down to the Congaree River a few yards above the mouth of Rocky Branch.

Within due time the defendant filed its petition in the Court of Common Pleas for Richland County for removal of this case to the District Court of the United States for the Eastern District of South Carolina (p. 16), which petition was denied.

Thereafter, on the 11th day of February, 1918, United States District Judge Smith remanded the proceedings to the Court of Common Pleas for Richland County (pp. 22-23).

In due season defendant demurred to the complaint upon several grounds (pp. 14, 15, 16). Upon the demurrer being overruled (pp. 23, 24) by the judge of the circuit court an appeal was taken to the State Supreme Court, both from the

order overruling the demurrer and from the order by the judge of the circuit court refusing the petition for removal from the State to the Federal court (pp. 19, 20).

The order refusing the application for removal to the Federal court and the order overruling the demurrer were both sustained by the decision of the State Supreme Court filed August 26, 1919 (pp. 212-215).

Thereafter the defendant answered and the cause came on for trial before the circuit judge and a jury at the June term, 1920, of the Court of Common Pleas for Richland County, South Carolina.

Upon the evidence offered by the plaintiff and the defendant the court directed the jury to find a verdict for the plaintiff for the property in dispute, but submitted to the jury the issue of damages for withholding the property by the defendant. As to this issue a verdict was rendered in favor of defendant (p. 206).

Thereupon an appeal was taken to the State Supreme Court, which affirmed the judgment of the Circuit Court by its decision filed November 26, 1921 (pp. 216-218).

Thereafter defendant filed its petition with the State Supreme Court for a stay of remittitur and rehearing (pp. 219-221), which petition was dismissed (p. 222).

Statement of Fact.

That this court may know the nature of the property in question and its relationship to navigation it is deemed proper state: The port of Georgetown is accessible to Columbia by navigation over the Congaree and Santee rivers, the Minnin Creek Canal, and Sampit River, which latter is an arm of Winyah Bay.

Broad and Saluda rivers joint at a point near the nothwestern boundary of the city of Columbia and from the Congaree River, which passes along and through the western boundary of the city of Columbia; flowing on for some miles the Congaree joins the Wateree and the two form the Santee, which enters the Atlantic near the port of Georgetown.

The lower part of Broad River and the Congaree above, along, and for a short distance below the western boundary of Columbia are greatly obstructed by shoals of rock, which prevent passage of boats capable of bearing large burden.

About the year 1822 the State, as a part of its internal improvements, began the construction of a canal to connect the Broad and Congaree rivers so as to afford navigation into Columbia and around the parts of the rivers obstructed by the shoals (Acts of 1818, 1819, 1822).

Long prior to the year 1887 the canal, though a small one, was used for navigation from its source at Bull's Sluice, on Broad River, to a point near Rocky Branch, where it connects with the Congaree (pp. 78, 81) (Act of 1887).

Prior to the year 1887 the State, by various means, undertook to enlarge the canal so as to make it more adequate for navigation and, as an incident, develop water power, but such efforts were not carried to completion when the Act of 1887 was adopted (p. 81) (Act of 1887).

The canal, while owned and in possession of the State, was, by the Act of 1887, placed in charge of the Board of Trustees of the Columbia Canal, "subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the Board of Trustees and *their assigns*" (Act 1887, sec. 1), and that board was, among other things, required to widen and deepen it throughout its entire

length, in accordance with the dimensions set forth in the act; to develop 10,000 horse-power of water power at the south side of Gervais street; to keep the canal open for navigation free of charge, and shall, as soon as is practicable, complete the canal down to the Congaree River, a few yards above the mouth of Rocky Branch.

Under section 3 of the Act of 1887 the Board of Trustees were authorized to construct a dam across Broad River "to improve and develop the power of said canal for navigation." The dam was constructed about the year 1890 (p. 81) and still stands as a complete barrier to navigation (pp. 170, 101, 79, 58).

In 1890 the Legislature passed an act to amend the Act of 1887, whereby it authorized the said Board of Trustees "* * * before the said canal has been fully developed and completed and turned over to the city of Columbia to sell, alienate, and transfer the same and all its appurtenances and the lands held therewith and all the rights and franchises conferred by this act on said Board of Trustees to any person or corporation, *subject, however, to all the duties and liabilities imposed thereby* and subject to all contracts, liabilities, and obligations made and entered into by the said Board of Trustees prior to such sale, transfer, etc." (Act of 1890, *infra*, p. 115).

On June 11, 1892, under the provisions of the above act, the Board of Trustees of the Columbia Canal conveyed the canal to the Columbia Water Power Company, "subject, nevertheless, to the conditions, limitations, provisos, and exceptions set forth and prescribed in the acts of the General Assembly of the State of South Carolina heretofore mentioned," reference being made to the Acts of 1887 and 1890

(p. 138). There was no consideration passing to the State other than the duties, obligations, and conditions contained in the Act of 1887.

Thereafter, on July 1, 1905, the Columbia Water Power Company conveyed the premises to the Columbia Electric Street Railway, Light and Power Company (the former name of defendant, plaintiff in error). This deed of conveyance (p. 140) subjected defendant to all of the conditions, limitations, provisos, and exceptions set forth and declared in the deed from the Board of Trustees of the Columbia Canal to the Columbia Water Power Company, all of which are set forth in the Act of 1887, and thus the defendant took possession of and holds the premises under the provisions and conditions of the Act of 1887, as well as subject to the sovereign and inalienable rights of the State in and to her navigable waters, all of which was adjudicated in the case of the State *vs.* Columbia Water Power Company *et al.*, 82 S. C. 181; 90 S. C., 568.

The Act of 1917 declared the conditions of the conveyance of the canal broken and asserted the right of the State to claim a forfeiture. The claim of forfeiture was, however, held in suspense for a period of ninety days from the approval of the act and during this period the officers representing the State, which, for convenience, we shall hereafter call the Canal Commission, were empowered to enter into any such arrangements or agreements with the parties claiming to have any right, title, or interest in the premises as they may deem advisable and proper to protect the interest of the State, the same, however, to be made within ninety days from the approval of the act and to be subject to the approval of the General Assembly; and, unless the claimants

enter into satisfactory arrangements, as provided in the act, the Canal Commission was directed to make such re-entry for the State as may be necessary and proper to obtain possession of the canal. The Attorney General was directed at the time of re-entry or thereafter to bring action in any of the courts of the State to assert the right of the State to said canal property.

On March 28, 1917, the Canal Commission notified the defendant, by letter, of the passage of the Act of 1917, enclosing copy thereof, and inviting it to appear and make such statements and proposals in the premises as it might see fit (Exhibit 8-A, pp. 141-142). In reply defendant stated that its communication was not to be considered as any admission of any obligation on its part (p. 143).

On April 25, 1917, in its letter to the Commission, defendant takes the position that there is no moral or legal obligation or duty resting upon it to complete the canal below Gervais street (p. 144). Thereafter similar denials of its obligations were reiterated (p. 147). Offers contained in the letters of defendant were confined to proposals to compromise the anticipated litigation and not to complete the canal or any part thereof or otherwise carry out its obligation to the State.

On June 11, 1917, at a meeting of the Canal Commission, Messrs. Elliott and Lyles, attorneys for the defendant, being present, Mr. Sinkler, of the Commission, asked Mr. Elliott: "Have you any proposition to place before the Commission proposing to complete the canal and carry out your contract with the State?" An evasive answer was given by Mr. Elliott (p. 152). Mr. Lyles, of the Commission, asked Mr. Elliott: "In your consideration of this matter have the people

you represent thought of proposing to this Commission to carry out your contract with the State?" To this another evasive answer was given (pp. 153-154). Mr. Lyles again asked: "Mr. Elliott, if there are different constructions, and I suppose there are, have you people considered proposing to the Commission to carry out the contract in accordance with your construction?" To this an evasive answer was given (p. 154). Mr. Lyles again asked Mr. Elliott: "From your statement a moment ago you take the position that there is no burden upon the Columbia Railway Gas & Electric Company at this time. Is that statement based upon the assumption that the contract is null and void?" Mr. Elliott answers: "We are here to endeavor to arrive at an agreement with the Commission under the terms of the act; if we are going to discuss the legal aspects of the case, I don't think it will profit us in arriving at an agreement. I will say, however, taking the legal aspect, *we deny any liability for the completion of the canal and claim that we fulfilled our duty in the premises entirely,* and propositions we make, as we made before, are privileged propositions for the sake of a settlement without prejudice" (p. 154). Immediately thereafter the defendant offered the Canal Commission to pay the State $75,000.00 (p. 156), subject to the terms of its letter to the Commission of April 25, 1917 (Exhibit —, pp. 144-5), and in this letter (Exhibit 8-D, p. 144) *defendant "takes the position that there is no moral or legal obligation or duty resting upon it as owner of the Columbia Canal or otherwise to complete the canal below Gervais street."* The letter further provided that if the State should complete the canal that the canal should vest and inure to and in the defendant. After Mr. Elliott, attorney for defendant, had

stated that the above offer (letter of June 11, p. 156) was the final proposal, the Commission rejected the same (p. 156).

On August 10, 1917, the Commission made demand upon the defendant for possession of the canal and gave notice that re-entry on behalf of the State would be made on the 20th day of August 1917 (Exhibit 8-K p. 157).

On August 14th defendant advised the Commission that "it denies in toto your claims concerning the Columbia Canal," and threatened the members of the Commission personally and individually if any of them should interfere with or trespass upon its property or possession (Exhibit 8-L, p. 159).

On August 20, 1917, the Commission advised defendant that it claimed possession and control of the property and that "by reason of the notice heretofore served upon it and of its reply thereto have performed the direction of said act in such way as is proper under the circumstances" (Exhibit 8-M, p. 159).

Thereafter this action was commenced and, after the first decision of the State Supreme Court was handed down on August 26, 1919 (p. 212), to wit, September 16, 1919, defendant made an offer to the Canal Commission to complete the canal subject to the terms of the letter addressed to the Commission (Exhibit 8-N, p. 159). This offer was made about two years after the expiration of the ninety-day limit in the Act of 1917 and after the Act of 1887 had expired by its own limitation. The correspondence between defendant and the Canal Commission growing out of the above offer failed of its design on account of the defendant refusing to agree to the proposals set forth in section 6 of the letter

from the Commission to defendant of October 11, 1919 (Exhibit 8-O, p. 160), and the Legislature took no notice thereof.

It will be noted that the Act of December 24, 1887, section 24 (*infra*, pp. —), provides, "That this act shall be of force for thirty-one years and shall go into effect immediately upon its passage," and that more than thirty-one years have elapsed before defendant even partially recognized its obligations thereunder, and defendant up to the present moment has made no effort to carry out the same.

The practical abandonment of the completed part of the canal after the defendant put into operation Parr Shoals Power Company is shown by comparison of the returns of the defendant, Power Department, for corporation license tax on gross receipts with those of Parr Shoal Power Company. The gross receipts of defendant in 1914, the first year of operation of Parr Shoals Power Company, was $135,130.84, the amount diminishing from year to year until 1918, when there were no receipts (p. 96). In 1914 Parr Shoals Power Company returned gross receipts for a similar tax, $60,779.13, the amount increasing from year to year until 1918, when it was $325,661.00 (p. 96). The absolute abandonment of the canal below Gervais street is shown by admission of answer. See testimony, Lyles (p. 46); testimony, Shand (p. 108), that rights of way would have to be acquired.

And so it comes about that a property, the Columbia Canal, which during the year 1904 was earning not less than $75,000.00 net (p. 185), was earning nothing in 1918, its business and contracts having vanished only to reappear as an asset of Parr Shoals Power Company, the dam of which

latter company having been operated by this defendant by its operating agreement so as to seriously diminish the navigable capacity of the Congaree River, and now the defendant claims the river is not suitable for navigation.

The time necessary for constructing the canal from Gervais street to Rocky Branch during the period 1905-1918 was 18 months to two years. Testimony, Ludlow (p. 56); testimony, Lu Kash (p. 64); testimony, Lee (p. 80); testimony, Shand (p. 108).

The cost of construction of the canal from Gervais street to a point on the Congaree River near Rocky Branch would have been, according to Engineer Ludlow, in 1919, $623,500.00. This amount includes $352,000.00 as the cost of a lock at Rocky Branch, which would leave $271,500.00 as the cost of the canal (p. 59); according to Engineer Lu Kash, a rough guess of 80 per cent less than $2,000,000.00, or $400,000.00 (p. 64); according to Engineer Lee, the cost between 1905-1918 would have been one-third of $1,630,440.00, or $543,480.00 (p. 80); according to Engineer Shand, witness for defendant, the cost as of May, 1918, would have been $325,000.00 (p. 108), and according to Engineer Crane, witness for defense, the cost would be about $550,000.00 (p. 111).

The ability of defendant to finance the expense of constructing the canal and, if so obligated, the locks near Rocky Branch, was unquestioned. The net earnings of defendant for the years 1906 to 1914, inclusive, were $1,160,685.11 (p. 70). On January 1, 1917, the net profits of defendant were $1,347,877.77 (p. 83). Besides the last-mentioned amount the defendant wrote off its books $333,180.09 in favor of Parr Shoals without consideration and in cancella-

tion of debts (p. 83). The net profits of the defendant as of December 31, 1919, including dividends on common and preferred stock and depreciation account, were $1,984,547.60 (p. 83), or from three to six times the cost of construction of the canal. All the money the defendant has made, aside from dividends and interest on bonds, has gone back into its property for improvements, extensions, and enlargements. The company is about ten times as large as it was twenty years ago (p. 128), and not one cent of its earnings has gone toward the extension of the canal below Gervais street, nor to develop 10,000 horse-power on the south side of Gervais street, nor to keep the canal open for navigation.

In 1905 defendant executed a mortgage on its property, including the canal, to secure bond issue in the amount of $2,000,000.00 (Exhibit 16, p. 172), and on July 8, 1907, bond issues had reached the full amount of $2,000,000.00 (p. 85).

In 1911 defendant executed its mortgage in the sum of $7,500,000.00 to secure a bond issue (Exhibit 17, p. 173). This mortgage covered all of the Columbia Canal property. Defendant's outstanding bonds in the year 1917 were $3,125,000.00 and $70,000.00 worth in the treasury (p. 84), leaving $4,300,000.00, which may be issued under the mortgage of 1911.

On August 1, 1912, defendant entered into an agreement with Parr Shoals Power Company and the South Carolina Development Company to develop a power plant on Broad River, commonly known as Parr Shoals. Simultaneously, defendant and Parr Shoals Power Company entered into an agreement, known as "Operating agreement" (Exhibit 19, p. 174), whereby defendant agreed to take over and operate

the Parr Shoals plant when completed, pay substantially all obligations of Parr Shoals Power Company, including bonds, interest on bonds, dividends on preferred stock, sinking fund, taxes, etc. (p. 176). Casual consideration of the "Operating agreement" will show that Parr Shoals Power Company is simply a veneer for an activity or project of defendant wholly financed by defendant. Simultaneously, to wit, August 1, 1912, Parr Shoals Power Company executed its mortgage to Columbia-Knickerbocker Trust Company, trustee, securing payment of bonds amounting to $3,000,000.00, and, for value received, the defendant guaranteed the payment of the principal and interest of said bonds as they mature; also the sinking-fund payments (Exhibit 18, p. 173).

Two million dollars of common stock of Parr Shoals Power Company, provided for in the "Operating agreement" (p. 174), was turned over to the defendant without consideration and is commonly known as "watered stock" (pp. 85, 129). If not "watered stock," defendant paid value for it and the amount thereof should be added to its assets and increasing its net earnings and surplus by that amount.

On September 1, 1911, defendant issued $1,000,000.00 of its common stock, without consideration, "for rights, privileges, and franchises," commonly known as "watered stock" (pp. 102, 129). Seventy-five thousand dollars dividends on its common stock was paid during the years 1917, 1918, and 1919 (p. 128). It thus appears that defendant was amply able to finance the completion of the canal, and that its failure to do so, while using it as a basis of credit to finance other enterprises, was a wilful disregard of its obligation.

Nothing whatsoever has been done by either defendant or its predecessor in possession toward completion of the canal from the north side of Gervais street down to the Congaree River a few yards above the mouth of Rocky Branch. No power has been developed on the south side of Gervais street. That part of the canal completed above Gervais street has not been kept open for navigation, the same being obstructed by two bridges, one near the Columbia Mills plant and the other at the city water works, the locks at the head of the canal are obstructed, and at the time of the commencement of this action the completed part of the canal was practically abanoned and the part below Gervais street absolutely abandoned for a period of more than twenty-two years.

In the year 1909, as well as subsequently, prior to 1917, Mr. Thornwell McMaster reported to the Judiciary Committee of the Legislature (p. 68) that defendant was not performing its contract. The representatives of the defendant company, Messrs. Elliott and Herbert, appeared before the committees and acknowledged the obligation and sought to dissuade the Legislature from demanding performance and to induce the Legislature to modify the contract so as to permit the canal to connect with the river and Government pond at Senate street, while those opposing this modification claimed that the Government dam was a failure, or later to substitute an electric line from Columbia to Granby (p. 68). Testimony by Senator Christensen of same purport (p. 67).

During these discussions before legislative committees the following resolutions were under consideration: In 1910, the Dixon resolution (pp. 197-8-9); the Graydon resolution (pp. 199-200); in 1911, the Johnson resolution pp. 200-1); in 1913, Welch & Weston bills (pp. 201-202); in 1914, Wyche

resolution (pp. 195-6-7); in 1915, the Etheredge resolution (p. 202); in 1916, the La Grone resolution (p. 203); in 1917, the Mauldin resolution (p. 197) and Ketchen resolution (p. 197). Action on these resolutions was postponed or not taken because of the representations of or at the instance of the defendant and its representatives. The Act of February 26, 1912, referred to by Justice Hydrick, in the decision upon the first appeal herein, by section 6, page 782, insisted upon the completion of the canal.

Mr. Alfred Wallace, defendant's superintendent, testified that he knew this matter was up before the Legislature in 1916, but did not represent the company down there. He left the company in 1916. He knew that at every session of the Legislature for several years this matter had been under consideration; that the question was always up as to whether they would take this property away from them (pp. 100-101).

A regular line of boats was operated between Georgetown and Granby by the Columbia Railway and Navigation Company (the latter point being a boat landing on the Congaree River, a short distance below Columbia and near the mouth of Rocky Branch, where the old canal connected with the river; it is also perhaps a half of a mile below the United States Government dam).

For some time prior to the last week in May, 1914, the schedules were made regularly (p. 90) and considerable freight was handled by boats at rates largely lower than railroad rates (p. 89). The latter part of May, 1914, the Parr Shoals Power Company cut off the water of Broad River and boats on the Congaree River stranded and were sunk during that time (p. 91). The cutting off of the water at

Parr Shoals was the cause of it (p. 91). Thereafter, on Sundays, Mondays, and Tuesdays, difficulties in navigation were encountered on account of impounding water at Parr Shoals (p. 91). The navigable capacity of the river was impaired by Parr Shoals (p. 91).

Regularly, up to the latter part of May, 1914 (p. 90), river steamers landed at Granby and irregularly thereafter until the service was abandoned. The freight was hauled over land by trucks from Granby to Columbia (p. 93).

The United States Government has spent some hundred of thousands of dollars in building a dam just north of the mouth of Rocky Branch to back water up to Gervais street to improve navigation, but this did not prove a success and steamers continue to land at Granby (pp. 49, 93). A canal, being stable, furnishes a better site for terminals than the bank of a river, which is subject to freshets (p. 64). There was a conflict of testimony as to whether the cost of finishing the canal would be justified from the standpoint of producing additional power and the revenue which might be derived therefrom.

The substance of the testimony offered by defendant was that there would be some difficulty in navigating a canal used for power purposes. It was claimed that this would be so if navigation was attempted while power plant was being operated at the lower end of the canal; that navigation on the river and coast-wise steadily diminishes; that boats with loads could not navigate Broad River, except during high water, and that railroad transportation is cheaper than water transportation; that Government has spent much to renew channels, but that traffic was not restored; that a boat line, other than the Columbia Railway and Navigation Com-

pany, operating on the Congaree River some years ago had failed because of boats sticking on sand bars, and it was supposed that the Government dam would back water up to Gervais street and obviate the necessity of completing the canal to Rocky Branch.

It will be noted that there is an entire absence of testimony as to any difficulty in completing the canal, no engineering problems to be solved, no difficulties in the way of physical construction, no lack of ability to finance the project, and no lack of time for either making financial arrangements, doing the engineering work, or the work of constructing the canal; no act of God or of the grantor to prevent performance.

ARGUMENT.

There was no irrepealable contract in this case within the meaning of article 1, section 10, of the Constitution of the United States.

If the court finds the above statement to be correct, the decision of the State court should be affirmed without further consideration of the several assignments of error; hence we present it first.

We are not now dealing with ordinary lands subject to sale, nor with proprietary rights of the State, but with navigable waters and the soil thereunder, held in trust by the State for all of the people, wherein an inalienable duty and obligation is due all of the people in their sovereign capacity. This trust cannot be relinquished by a transfer of the property and the control of the State, for the purposes of a

trust can never be lost. The State can no more abdicate its trust over the property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties, than it can abdicate its police powers in the administration of government and the preservation of peace.

The canal is a governmental subject, and there can be no contract and no irrepealable law on the subject.

The Act of 1887 and conveyances thereunder was merely a license and defendant a governmental agency charged with effectuating a governmental purpose, to wit, improvement of navigation, and the State, in consideration of public policy, has determined, its agent having refused to act, that the work and property shall not be further entrusted to defendant licensee.

The State might have repealed the acts of 1887 and 1890 and it would have been valid and effective for the purpose of restoring the State to the same control, dominion, and ownership of the property that it had prior to the passage of the Act of December 24, 1887.

A course more considerate of defendant has been chosen than the peremptory repeal of the act and annulment of the engagement by allowing the defendant ninety days to get itself in a frame of mind to agree to perform the condition. If the ninety days allowed in the Act of 1917 for defendant to indicate its purpose to perform its undertaking had not been provided the obligation of the contract would still not have been impaired within the meaning of article 1, section 10, of the Constitution of the United States or in violation of the 14th Amendment. The State, without giving additional time and without taking the least consideration of

defendant's situation, was entitled to repossess herself of the property and proceed in some other way or through some other agency to secure the desired improvement of navigation of her navigable waters—to discharge her inalienable duty and trust.

> "The Columbia Canal, constructed by the State to improve navigation of the Congaree and Broad rivers, two navigable streams and actually used for many years for such purpose, is to be regarded as a part of those rivers, and hence to be navigable like the other portions of them."
>
> "The State as sovereign holds the property right of unobstructed navigation of the navigable waters of the State in trust for the people of the State and of the United States."

The two above quotations are from a case in which the State of South Carolina was plaintiff and Columbia Railway Gas and Electric Company was defendant.

State, etc., *vs.* Columbia Water Power Company *et al.*, 82 S. C., 181; 63 S. E., 884.

Const., S. C., 1868, art. 1, sec. 40; art. 6, sec. 1.

Const., S. C., 1895, art. 1, sec. 28; art. 14, sec. 1.

> "The bed or soil of navigable waters is held by the people of the State in their character as sovereign in trust for public uses for which they are adapted."
>
> Illinois Cent. R. R. Co. *vs.* Illinois, 146 U. S., 388; 36 L., 1018.

> "The trust devolving upon the State for the public, and which can only be discharged by the management and control of the property in which the public has an interest, cannot be relinquished by a transfer of the property."
>
> *Id.*

"The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."

Id.

"There can be no irrepealable contract in a conveyance of property by grantor in disregard of the public trust under which he is bound to hold and manage it."

Id.

See People *vs.* Kirk, 53 Am. St. R., and note, p. 294.

See 27 R. C. L., Waters, sec. 236, p. 1327.

See Long Sault Development Co. *vs.* Kennedy, 212 N. Y., 1; Ann. Cas., 1915-D, p. 56.

The canal was used for many years as the sole means of passing around the shoals at the confluence of the Congaree and Broad rivers, and the improvement contemplated by the Act of 1887 was to enable larger craft to pass. Without the canal no craft may pass while Broad River, its bed and channel, is completely obstructed by defendant's dam, and if defendant is permitted to hold it the whole use of the river at the location is denied the public and the public trust has been abdicated by the State.

If the court should hold that the foregoing is not sufficient to justify an affirmance of the State court, then we submit the following:

There were conditions subsequent in the acts of 1887 and 1890 and the conveyances thereunder the violation of which would work a forfeiture.

The position of the defendant throughout this litigation has been predicated upon this theory, that this contract did not contain, either expressly or impliedly, such language as could be construed to impose upon the grantee a *"condition subsequent,"* but that, on the other hand, the language implied a covenant. But, as herein stated, the Supreme Court of the State of South Carolina has construed this contract in the light of the history of all the legislation pertinent thereto and such acts as necessarily form a part thereof and has held the contract to embody a *"condition subsequent,"* the default in the performance of which would work a *forfeiture*. The State of South Carolina takes the position, therefore, that by this construction the Supreme Court of the United States, in reviewing this case on appeal, *is bound*.

As authority in support of this position, we submit only a few of the multitude of citations to which the court's attention might be directed. In the case of Chicago and N. W. Railway, plaintiff in error, against Nye Schneider Fowler Company, decided November 13, 1922, and reported in 67 L. Ed., page 46, the court had under consideration the constitutional validity of two of the statutes of the State of Nebraska. The Supreme Court of the State, in passing upon the question on appeal, in connection with one of these statutes, construed the statute by giving to the initial carrier, which the statute held responsible to the shipper for loss, the right of subrogation as against successive connecting

carriers. Counsel for the plaintiff in error on appeal contended that the statute could not be given this construction, as a matter of law, and that the court had interpolated into its construction of the statute a mere principle of equity. Mr. Justice Taft, in writing the opinion for the court of review, said in this connection:

> "We cannot follow this distinction. We have here a construction of this statute by the Supreme Court of the State in which that tribunal holds that under all the circumstances to which this statute can apply, subrogation does exist."

In the case of William Truax *et al. vs.* Michael Corrigan *et al.*, decided by this court December 19, 1921, and reported in 66 L. Ed., page 132, Mr. Chief Justice Taft, in delivering the opinion for the court, says:

> "The only respect in such a case in which this court is bound by a judgment of the State Supreme Court *is in the construction which that court puts upon a statute.*"

In the case of Clement National Bank, plaintiff in error, *vs.* State of Vermont, decided November 10, 1913, and reported in 58 L. Ed., page 147, a statute of the State of Vermont was under consideration and the basis of appeal was the construction put upon the statute by the State Supreme Court. Mr. Justice Hughes, in delivering the opinion of the court, says:

> "The decision of the State Supreme Court is controlling as to the persons upon whom the statute fixes liability. It was the province of that court to determine what the terms of the statute authorized.

> commanded, or forbade, and it is for this court to say whether, in view of its operation thus delimited, it conflicts with the Federal law."

In the case of the First National Bank of Aberdeen *vs.* County of Chehalis, decided by this court April 12, 1897, reported in 41 L. Ed., at page 1069, the construction put upon a State statute is also made the basis of appeal and review of this court on a writ of error, and the court similarly in this case held that "this court is bound by the judgment of the highest court of appeals of the State in the mere matter of construction of one of its statutes."

There is no question open for this court, therefore, in the opinion of the plaintiff in this case, as to whether the statute embraces a condition subsequent or a covenant, for it is definitely determined that it imposes a condition subsequent, and that this condition subsequent was a part of the deed or contract under which the defendant in this case took the property in dispute; hence the only inquiry open to the court is whether or not, accepting this construction of the statute as final, there was in its application a violation of any constitutional rights of the defendant, and it is submitted that this phase of our argument is applicable to the other exceptions made by the plaintiff in error, raising, in effect, the same question in different language and terms.

But if this court should not find that it is bound by the decision of the Supreme Court of South Carolina that there was a condition subsequent in the contract, then we submit the following in response to defendant's second specification covering the first and second assignments of error:

It appears from defendant's brief, page 42, that it claims that it did not receive the grant under the Act of 1887, and

that, therefore, it was not subject to the performance of the conditions and limitations therein prescribed, and to reach this conclusion treats the Act of 1890 as if it were a separate and distinct act, having no reference to the Act of 1887, notwithstanding the fact that the title of the Act of 1890 states that it amends the act approved December 21, 1887.

The Act of 1887, section 1, under which the grant is made, provides that it shall be "subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the Board of Trustees *and their assigns.*" The Act of 1890 amends section 23 of the Act of 1887 and gives authority to the Board of Trustees to sell, alienate, and transfer the canal and all rights and franchises conferred by that act (the Act of 1887) on said Board of Trustees to any person or corporation, subject, however, to all the duties and liabilities imposed thereby, etc., so that section 2 of the Act of 1890, the same being section 23 of the Act of 1887, should be read into the Act of 1887 just as if it had originally been a part thereof, but taking effect at a later date.

> "A statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there, and the amendment itself so thoroughly becomes a part of the original statute that it must be construed in view of the original statute as it stands after the amendments are introduced and the matters superseded by the amendments have been eliminated."
>
> Blair *vs.* Chicago, 201 U. S., 400; 26 Sup. Ct. Rep., 427.

> "On January 11, 1892, the Board of Trustees of the Columbia Canal conveyed by deed to the Columbia

Water Power Company the canal and its appurtenances, subject to all of the conditions, duties, limitations and liabilities imposed by the statute under which the State turned over the property to the trustees of the canal. The Columbia Water Power Company went into possession under this deed and completed the canal from its source at Bull's Sluice to the north side of Gervais street. Afterwards, on July 1, 1905, the Columbia Water Power Company, by its deed, made a like conveyance of the property to the Columbia Electric Street Railway Light and Power Company, subject to the same duties, conditions, limitations and liabilities."

"The Columbia Street Railway Company is the assignee of the Board of Trustees of the Columbia Canal and as such assumed all obligations imposed on that board by the statute."

"One of the conditions and limitations to which all rights acquired by the Columbia Street Railway Company is subject and which was expressly imposed upon it by the act is laid down in section 5 of the statute * * *" (referring to the Act of 1887).

State *vs.* Columbia Water Power Company, 90 S. C., 568.

The above quotations are from decisions of the Supreme Court of South Carolina in which the State of South Carolina was plaintiff and the Columbia Electric Street Railway Light and Power Company (now the Columbia Railway Gas and Electric Company, the plaintiff in error herein), was defendant; and here we have an adjudication in 1909 that defendant holds the property subject to the performance of the same duties, conditions, limitations, and liabilities as are set forth in the Act of 1887, and the court in that case found the

rights of the State and of defendant to depend upon the Act of 1887 as amended by the Act of 1890.

State *vs.* Columbia Water Power Co., 82 S. C., 181; 90 S. C., 568.

We think the above adjudications are an adverse and final disposition of the claim of defendant that it does not hold the property under the conditions imposed by the Act of 1887.

So we come to a point as to a proper construction of the obligation—the condition—and "if the Act of 1876 is fairly susceptible of either of the constructions we have indicated, and we think it is, the interpretation must be adopted which is most favorable to the State. The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchise, or privilege in which the Government or the public are at interest."

Cooshaw Mining Co. *vs.* State of S. C., 144 U. S., 550; 12 Sup. Ct. Rep., 689.

Blair *vs.* Chicago, 201 U. S., 400; 26 Sup. Ct. Rep., 427.

"And where words are ambiguous, legislative grants must be interpreted most strongly against the grantee and for the Government, and are not to be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed. Any ambiguity must operate against the grantee and in favor of the public."

United States *vs.* Michigan, 190 U. S., 379; 23 Sup. Ct. Rep., 742.

The question that is to be determined is, What is the proper construction of the language used in the acts of 1887

and 1890?—whether they constitute a condition subsequent, the violation of which would cause a reversion of the property to the original grantor, the State of South Carolina. This construction of the acts of 1887 and 1890 must be made in the light of the history of the canal as appearing upon our statute books and the public resolutions of the General Assembly of South Carolina prior to it, as well as the decisions of the Supreme Court of South Carolina.

> "It is a fundamental rule of statutory construction that not only should the intention of the law-maker be deduced from a view of the whole statute and of its every material part, but statutes *in pari materia* should be construed together." 25 R. C. L., "Statutes," sec. 285.
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> "Statutes *in pari materia* to which reference may be made in aid of construction are not only contemporaneous statutes, but also earlier statutes *in pari materia*." 25 R. C. L., "Statutes," Sec. 287.
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> Norton *vs.* Nebraska, 21 Wall., 660; 22 L. Ed., 639.
>
> Fussell *vs.* Gregg, 113 U. S., 550; 5 Sup. Ct. Rep., 631.

See also

Act of December 16, 1918, 6 Stat., 91.

Act of December 18, 1819, 6 Stat., 124, sec. 8.

Act of December 21, 1822, 6 Stat., 189, and Ordinances of Columbia, page 37.

Act of December 20, 1823, 6 Stat., 214, and Ordinances of Columbia, page 43.

Act of December 20, 1825, 6 Stat., 277, sec. 2.

Act of 19th December, 1843, 11 Stat., 304, vesting part of canal in Frederick Green, with right of public use for navigation reserved, and lessee required to keep it open for that purpose.

Act authorizing sale of canal, 21st December, 1865, 13 Stat., 293. (This act seems to have for its principal purpose the navigation of the canal for boating, and also hydraulic purposes, which authorizes the use of the land for a space of 60 feet on either side of the center line of the present canal. Nothing was done under this act. This act reserved no water power.)

Act to provide for the establishment of penitentiary, 21st December, 1866, 13 Stat., 366-28, sec. 2.

Act of December 19, 1866, 13 Stat., 378. (No sale was made under this act.)

Prof. Le Conte's report as to original dimensions of Canal.

Reports and Resolutions, sessions 1877-78, page 618.

Joint resolution, June 7, 1877, 16 Stat., 316.

Act to declare title of State in Columbia Canal and appurtenances, July 16, 1878, 16 Stat., 360.

Act authorizing appointment of Canal Commission, March 12, 1878, 16 Stat., 444.

Reports and Resolutions, 1878, pages 377 and 776.

See

Thompson and Neagle Act, 17 stat., 37.

Act of 1882, February 8th, 17 stat., 855.

Act of 24th December, 1887, 19 stat., 1090.

See

Water Power Company *vs.* Electric Company, 43 S. C., 154.

Act authorizing guarantee of bonds, 24th December 1887, 19 stat., 1097.

Act authorizing sale by Board of Trustees, 24th December, 1890, 20 stat., 967.

See decisions of our court:

Water Company *vs.* Campbell, treas., 75 S. C., 34.

State *ex. rel.* Lyon, attorney general, *vs.* Columbia Water Power Company, 82, S. C., 191; 81 S. C., 113; 90 S. C., 568.

See, also, concurrent resolution, 27 Stat., 445-448.

Act of 28th February, 1914, 28 stat., 881.

Act of February 26th, 1912, 27 stat., 779.

South Carolina Constitution, 1868, art. 1, sec. 40.

South Carolina Constitution, 1895, art. 1, sec, 28.

South Carolina Constitution, 1895, art. 14, sec. 1.

A study or examination of these acts and decisions will onvince the court that in the entire history of Columbia anal project that the Legislature in its acts or by resolu-ion or by investigation reported to it never for a single mo-ent gave any intimation of any abandonment of its duty nd obligation to maintain the canal from the time it was onstructed, about 1822 or 1823, up to the present time but s a part of the navigation system of the Santee, Congaree, oad, and other tributary streams, the navigability of the nal being the means of connections between the two rivers,

Broad and Congaree, passing around the shoals to actual navigable waters, it was evidenced that the use of this canal should be maintained for the public for the purposes for which it was originally built. The grand purpose, therefore, of the Legislature, voicing the policy of the State and its intention, was primarily for navigation by means of the construction of this canal to avoid the impassable shoals in the rivers mentioned. This is evident, not only by prior acts, but in the acts of 1887 and 1890. They were mindful of the constitutional and statutory provisions cited herein that all navigable waters shall remain forever public highways, free to the citizens of the State and United States. As a matter of fact, this particular canal had been devoted to a specific and public purpose, although there may have been incidental or secondary purposes for which it could be used, the specific purpose being the connection of the navigable waters of the Congaree and Broad rivers and serving the citizens of the upper counties of the State. Its effect upon commerce was well known and was recognized as bringing into competition and lowering the rates by rail transportation and for certain kinds of goods which could be carried to local points in the State and to connections with coastwise trade at a cheaper rate than by rail.

We, therefore, assert that the great purpose that the State had in passing this law and granting the right to sell was to promote navigation and for the benefit of the citizens with regard to commerce which would be open upon the said rivers and which would be wastly increased by this means of reaching the sea.

The intention of the Legislature that only a part of the canal should be continued and developed, to wit, that por-

tion of it which should be completed to Gervais street and there stopped, cannot be drawn from any possible construction of the statute. Its intention was that the whole of the canal, making connection with the waters of the Broad and Congaree rivers, should be completed for that purpose. The canal, as it appears from the official records, was something near five miles long. To cut it in two and allow near two miles of it, which makes the connection with the Congaree waters, to remain utterly undeveloped and abandoned and disregarded was simply to destroy the navigation feature entirely. This can be seen by the very effects, which are known to exist, that its non-construction and development below Gervais street to Rocky Branch has finally brought about a complete cessation of any commerce on the Congaree River.

There was a trust and obligation resting upon the Legislature under the Constitution, if not under the sovereign rights inherent in the State, that these streams should be open for the public and, where natural obstructions arose and connections by way of canals were made, that they also should be maintained for the use of the citizens of the State.

At the time of the act of 1887 the State Legislature was permitted by implication from inaction by Congress in the exercise of its power to improve its own streams, subject to such power over them for interstate commerce, and all States indulged in this right, especially South Carolina, until the construction of transportation by rail made it more convenient and expeditious to use the railroads rather than the canals which had been constructed. Some of them were practically abandoned, but in the case of State *ex. rel.* Lyon, *vs.* Power Company, 82 S. C., 181; Same *vs.* Same, 90 S. C.,

568, it will be seen that commerce upon the Broad River never did stop until obstructions by dams, permitted by the State, were made across the navigable streams, contrary to the constitutional provisions (it is submitted).

From an examination of the citations we have made of the acts and joint resolutions it would appear that the canal, before the commencement of its development by the Canal Commission or Board of Trustees, was sixty feet wide, including its banks on both sides, and was used by boats, etc., for the transportation of cotton, etc.

Under the rules of the court we do not desire to extend the argument beyond pointing out the points upon which we think the construction of the statute is to be derived. Hence we say that the canal as originally constructed was solely for the purpose, so far as the obligations of the State were concerned, for navigation as a part of the system of internal improvement, except some instances in which, by reason of the fall created by the water, the Superintendent of Public Work or those in charge could, without interfering with this navigation, let out to private parties or others the right to use it for a consideration. This was for the use of water in the canal running through water wheels upon the banks and emptying into the original stream.

We then have it established, beyond any doubt whatever, that for no moment up to the passage of this law and of the contract contained in it or of the grant containing an agreement was there any abandonment of the navigation feature.

The idea for the sale of water power in any special amount which would be for the use and advantage of the city of Columbia and the citizens of the State and the State peni-

tentiary, especially the latter, was developed by the message of Governor Orr to the General Assembly November 27, 1866 (Journal, House of Rep., 1866, pp. 25 and 26), upon which message the Legislature acted in establishing a penitentiary, wherein the use of power could be had and which was continued until after the purchase by the Columbia Water Power Company. See Water Power Company *vs.* Electric Company, 43 S. C., 154.

Thereafter manufacturing became an important feature in the progress of the State, as well as the South Atlantic States, and it became an important, but incidental, feature in the canal, the main and essential purpose still being navigation.

From thenceforth the two great purposes, navigation and supplying water power by the means known at the time the act was passed, and, of course, contemplating any modern means by transmission of electricity or otherwise, were kept clearly in view, and no private use of the canal was even tolerated to the exclusion of the public, the State reserving, also, the right to aid, whenever it should be necessary, its navigation. See section 5, Act of 1887.

Now, in 1887, no one can doubt the right of the Legislature to dispose of the property upon such terms as it saw fit. It could create any terms in the sale which, if violated, would cause a forfeiture or reversion or, stating succinctly, it could by such terms create a condition of forfeiture and re-entry, or it could create covenants running with the land in favor of the grantor. See exemption from taxation, Water Power Co. *vs.* Campbell, treas., 75 S. C., 34; or, as above stated, the property could have been disposed of by the Legislature under no restriction by way of condition,

limitation, or covenants whatsoever other than the Constitution of the State and the Constitution of the United States. See Constitution of 1868, art. 1, sec. 40; Constitution of 1895, art. 1, sec. 28; art. XIV, sec. 1, and interstate commerce clause of the Federal Constitution.

The Legislature could set aside all former statutes and al rules of common law and equity if it saw fit, provided it did not come in conflict with the two constitutions mentioned, especially that of the United States over commerce. But it could not throw off its duty as representing the sovereignty of the State, existing in the people, by holding the navigable streams and waters of the State as trustee for them, keeping them upon equal terms for all of the citizens of the United States, nor could it destroy the provision in the State Constitution which prohibited it from selling, obstructing, or doing any act to destroy the right of the State to the use of these waters.

As may be seen from the reports and resolutions of the Legislature and acts passed relating thereto, the State owned in fee the soil over which the water flowed and the banks containing the same, constituting the canal, from its source at Bull's Sluice to Gervais street. It also owned in fee the lands constituting the canal—embankments and the soil—from Gervais street to Rocky Branch, its ending. This will appear by reference to the decision in Power Company vs. Electric Co., 43 S. C., 154.

Looking, then, to the act in this light, we find that by the first section of the act the property was granted, transferred, assigned, and released to the Board of Trustees as a whole from its source at Bull's Sluice to where it emptied into the Congaree for the purposes set forth and expressed

in the said act, subject, nevertheless, to the performance of the conditions and limitations therein set forth and prescribed on the part of the said Board of Trustees and their assigns. There is a proviso in this section, to wit, that if the canal should not be completed to Gervais street within seven years from the passage of the act all the rights, powers, and privileges guaranteed in said act shall cease and the property shall revert to the State, and it is claimed that such proviso exhausted the intention of the Legislature to enforce the conditions in the act with reference to the completion of the canal and its other requirements if the canal was completed to Gervais street.

Our contention is that this was simply a favor to the grantee made by an act of the Legislature and does not operate to destroy the whole scope and intent of the act.

In the habendum clause of the act the property passed to the Board of Trustees, its successors and assigns, forever, subject to the conditions and provisions aforesaid. Nor did the right to sell and transfer the same by the Board of Trustees, with the approval and consent of the nine members of the City Council of the City of Columbia, which had been made beneficiary of the deed, which was a consent by the city, for, as a matter of fact, the nine members were two-thirds of the entire council and could therefore control its action, but the act specifically expressed that such sale should be subject to all of the duties and liabilities imposed by the original act and subject to all contracts, liabilities, and obligations made and entered into by said board prior to said sale.

The term "duties and liabilities" would undoubtedly comprehend all conditions, precedent or subsequent, or all cove-

nants, or anything which the Legislature had in view from the terms of the act, and cannot be restricted and limited, as the defendant contends.

It cannot be reasonably contended that if this act contained a condition subsequent or terms and provisions which would create a forfeiture from a proper construction of the act and would convince one that that was the intention contained in the whole act a court would not carry out the purposes and objects for which the act was passed, being both a law and a grant, even if it be with a consideration; and when the conveyance was made to the Columbia Water Power Company, such conveyance contained in the habendum clause these words: "To have and to hold all and singular the premises before mentioned unto the said Columbia Water Power Company, its successors and assigns, forever, subject, nevertheless, to the conditions, limitations, provisos, and exceptions set forth and prescribed in the acts of the General Assembly of the State of South Carolina" (p. 138).

We thus have the act itself expressing the purposes for which the conveyance was made and using the words: "Subject, nevertheless, to the performance of the conditions and limitations therein set forth and prescribed on the part of the Board of Trustees and their assigns." We have the contemporary conveyance, made under that power, using the same language.

The conveyance to the present company by its former name also contains the clause "subject, however, to the conditions, limitations, provisos, and exceptions set forth and declared in the said deed of conveyance" (p. 140).

Section 7 of the act states that the Board of Trustees shall, within two years from the ratification of the act, complete the

said canal so as to carry a body of water, etc., from the source of the canal down to Gervais street, etc., and shall, as soon as is practicable, complete the canal down to Congaree River, a few yards above Rocky Branch, and as that section did not declare that the absolute failure to perform the duty of completing the canal as soon as practicable, there could be no reversion and the rights of the State were gone by waiver, acquiescence, and the statute of limitation. In other worrs, that by non-action the Legislature of South Carolina had lost control over its trust and of the canal property below Gervais street absolutely, and that it was now privately owned by this corporation. Such a construction would destroy every purpose that was declared in this act.

It may be quite true that there are some direct requirements that are not of such a character as to create a forfeiture and can only be enforced by remedy of indictment to remove the obstruction and nuisance, or by mandatory injunction, or by specific performance as a covenant, but this is entirely aside from the position we take. The Act of 1917 requires the taking possession of the property after ample time has been given to make some arrangements with the company, and the Attorney General has followed the procedure indicated by the Legislature, as it was his duty to do.

Should we admit that the Act of 1887 does not express the intention that the State, upon failure to complete the canal for navigation and for the other purposes therein mentioned, should revest itself of the title thereto, it would follow that the consideration moving the State to make this conveyance was lost, or that, should this intention be found to exist, then the clauses constituting only covenants which would run with the property must be construed as such

covenants as can be enforceable at law, but to do this would put the State in a position to make inadequate its remedy to perform its duties toward the citizens of the State or to be in a position to properly enforce completion of the canal.

The case so much relied upon by the defendant corporation, Oregon, etc., R. Co. *vs.* U. S., 213 U. S., 393; 59 L. Ed., 136, is also cited by the circuit judge in his order overruling the demurrer (p. 23). The two provisos there relied upon are totally unlike this act. The lands were public lands of the Government intended for sale and occupation by individuals. Such provisos did not relate to the roadbed and the things incidental or necessary for its operation, but merely to outlying lands along the line, and the price for such lands and the restrictions upon the acts of the settlers could readily be enforced by injunction. There was no necessity for the United States Government to retake possession of the railroad for failure to comply therewith, and there was no intention that the lands should be forfeited, although such grants could have been declared null and void, but here it is necessary, because of the repeated failure and refusal on the part of the defendant corporation to perform or carry out the purposes for which the grant was made. The whole property must, in contemplation of the statute, in order to effect the purpose, be restored to the State, whatever may be the consequence of the wrong committed by the defendant company, and it has no right to complain because of its own wilful violation of the terms of the act.

As stated, this case when read, although many citations from it have been made by defendant corporation, will be found to support the conclusions of the State court and of

the contention that it is necessary, to effect the purpose of the Legislature, to hold that there are subsequent conditions, and we contend a construction should be given to this act which will give it such effect and enable the State to perform its duty.

It also holds, even as counsel cites, that there are no express words, terms, or phraseology necessary to create a condition subsequent, and this decision specifically holds that the act there was a law as well as a grant. So here this act is a law passed by the Legislature as well as a grant, although there may be, as always would be, a consideration of some nature—money paid or the performance of other duties. The contract is reciprocal. The State grants and assigns certain property to a party in consideratoin of certain things he shall do and they are set out in the act of the Legislature, which act contains the objects and purposes for which the contract is made.

There is nothing at all in the case of Water Power Company *vs.* Campbell, treas., 75 S. C., 34, which at all militates against construing the requirements in this act to complete the canal from its source to the point where it empties into the Congaree River as a condition subsequent. That was an action to recover taxes paid, alleged to have been illegally levied on account of the exemption clause contained in the act, and the court distinctly held that that exemption was part of the consideration of the contract.

We do not deny that there was an agreement between the parties, one to give and the other to perform, and that when the party has performed or is performing a material consideration cannot be taken away from one party by legislative action; but here is the party contending that he has the

right to refuse to perform and, in effect, declaring that it is not a contract, claiming at the same time it is. This case, in our opinion, is entirely in support of our contention as to what was the intent of the Legislature. The court, in the Campbell case, affirmed all of the reasons of the circuit judge, among which was the following:

> * * * "For the Legislature in authorizing the trustees to convey to a purchaser said property, declared that all the rights and franchises thereto belonging should vest in the purchaser. The purchaser assumed certain trusts and obligations that were annexed to the property. In consideration for this it is but right that the exemption from taxation that was annexed to the property should follow it into the purchaser's hands as a right and franchise belonging to the property."

The State court, in the cases of State ex rel. Lyon vs. Water Power Company, 82 S. C., 181; 90 S. C., 568, gave a summary statement of the history of the canal and of the statutes. It was there, however, dealing with that portion of the canal that had been completed and was intended for operation, but the parties had created a nuisance which by injunction it sought to have removed. They are highly interesting cases upon the question of the navigation features, but it cannot be cited as showing that injunction or specific performance is the remedy which should be selected when the Legislature has selected another, nor sustaining their contention that there is not a condition subsequent to be gathered from the entire statute for violation of its duty to complete the canal below Gervais street, which it has never touched, and refuses absolutely, before legislative committees and before the present Canal Commission, to do.

Nor can we find anything in the case of Hammond *vs.* R. R. Co., 15 S. C., 10, which will militate against the position which we contend for, that the intention of the Legislature is to be drawn from the whole acts of 1887 and 1890 and the preceding acts, and the decision thereafter made by the court. See 43 S. C., 162; Water Power Co. *vs.* Campbell, treas., 75 S. C., 38. In this latter case the circuit decree, which was affirmed without an opinion (except stating that it was satisfied with the reasons stated by the circuit judge in overruling the demurrer and dismissing the appeal) states: "In the decision of these questions the court must take judicial cognizance of the public acts of the Legislature and the history of the State and its internal public affairs."

Referring to the repeated assertion made by the defendant corporation that the court held in the case of Water Power Co. *vs.* Campbell, treas., *supra*, that it was a business contract, we do not find the word "business" in this decision; nor, when it speaks of the contract, does it destroy the idea that such an act constituted a law as well as an agreement, passing the right, title, and interest of the State presently, subject, however, to be defeated by the non-performance of the agreements by the grantee to be performed in the future. Yet it must be noted that the present company, by its conveyance from the Columbia Water Power Company, never acquired the electric-power station of the Columbia Mills Company on the western embankment of the canal (p. 140). In the Hammond case, the allegations of the complaint, after alleging the conveyance of the land to the railroad company to them and their assigns forever, used the words: "*Provided, always,* and this deed is upon the express conditions that a certain system of drainage was to be kept up

by the railroad company." The court held that this created a condition subsequent, expressed in the deed or by implication and voidable by the grantor upon condition broken. This deed, however, delegated no public interest or public duty. It was a simple deed by a private citizen to a quasi-public corporation. A demurrer was made to this cause of action, claiming that the land had reverted, and the court, in dealing with this question, went very far into the consideration of estates upon condition subsequent and deriving them from feudal origin, but distinctly held that if created by the parties interested they have been sustained notwithstanding the old rule, which appears in the text-books and old decisions, that conditions subsequent are not favored. It further holds that the condition may be expressed or implied.

While the court does say that the intention must be reached by interpretation or construction of the instrument in which it is alleged to exist, yet in the case of Water Power Co. *vs.* Campbell, treas., 75 S. C., 38, *supra,* it is held that judicial cognizance will be taken of the legislative history and of the laws of the land with regard therto. After very much discussion of such matters the court, nearly twenty years ago, reached the conclusion that it was a question of intent, which may be in the conveyance expressed or implied, and if the intention of the grantor is implied the courts will give it effect notwithstanding some of the minor rules of construction or the hesitancy of courts of equity in applying rules of law when they can exercise equitable principles which will hurt nobody; in other words, to nullify the intention of the parties if it does no special harm to the grantor party.

In truth, our reading of all the cases has led us to the conclusion that the courts in construing conveyance or leases in a written instrument declared that whether it is in form a condition, a breach of which forfeits the whole estate or a covenant running with the land, on which only actual damages can be recovered or specific performances had, the intention will prevail. But they do this by virtue of reaching and carrying into effect the intention to be gathered from the whole instrument. Here, as above stated, was an act of the Legislature declaring the terms upon which the canal could be conveyed by the Board of Trustees. There was no colloquium between the parties or negotiations whatsoever. The courts, then, must look to the acts authorizing the conveyance to ascertain the intention of the State and not to any construction the grantee may have put upon the instrument at the time of purchase or subsequently.

It is different where a bargain and sale is made between parties who have attempted to express their common intention in the written instrument. Here, too, is to be observed in the construction the great idea running through the whole transaction that there is no promise by the grantee expressed in the conveyance, his promise only arising from his acceptance of the deed of conveyance under the statute. The Board of Trustees had no authority to make any other transfer of the property than is expressed or implied in the statute, and whatever they did outside or beyond the statute may or may not be upheld as an outside agreement not binding upon the State.

It cannot be contended that the tendency of the modern decisions and of the present law has been to put a mere scientific view upon the written instrument relating to these

clauses and to reject technical terms of the old common law. It is to the contrary. The courts may disregard the old forms of common law and the old decisions and construe a clause affecting the intention of the parties in carrying out their interpretation of the statute. In fact, it has been held time and again by the most recent decisions, which are unnecessary to quote, that while the presence of such a clause was formerly used to introduce a condition, such clause is no longer essential to the creation of a condition subsequent by which the estate may be defeated at the exercise of an election by grantor or his heirs.

As was said, the question is always, notwithstanding the language used, open to the determination most consistent with the reason and sense of the thing. Whether this act created a condition or a covenant must depend upon what was the intention of the parties, for covenants and conditions may be created by the same words. The intention of the party to the instrument, when clearly ascertained, is of controlling force. That these statements are true can be readily ascertained by any new text-books upon the law of conditions and covenants.

Take, for instance, 2d Washburn's Real Property, 6th Ed., sec. 942, cited upon argument in the State court in this case. Mr. Washburn says, in effect, that a condition will not arise unless it is upon terms upon condition, particularly when there is no clause or words of forfeiture, but we know that not to be the rule, for if the intention is gathered and satisfies the court that such a condition subsequent was intended, it does not make any difference what the phraseology may be or whether any formal words were used or not. Southern, etc., Co. *vs.* Derfler, Ann Cases., 1917*f*, 744.

The case of Railroad Co. *vs.* White, 10 S. C., 155, cited in defendant's argument as to the rule *expressio unius est exclusio alterius,* we think does not apply for the reason that it is adding additional conditions; whereas our contention is that there is but one intention which appears from the whole act and which controls the Legislature, and the proviso in the first section of the act was merely to postpone a reversion for seven years which would have otherwise occurred in two years under the provisions of section 7.

This is a concession and limitation upon the intention of the Legislature that the canal should be completed as soon as practicable, for there can be no doubt of the application of the general rule that where the performance of the condition subsequent is to be performed by the grantee at their own time and convenience, or, to use equivalent language, as soon as practicable, that it means that it shall be performed within a reasonable time, or the equivalent, as soon as practicable.

We conclude this part of the discussion by saying, as was said long years ago by Chancellor Kent (see 4 Kent's Com., page 152, star page 133):

> "The distinctions on this subject (estates upon conditions, continuing conditions and covenants running with the land) are extremely subtle and artificial; and the construction of a deed, as to its operation and effect, will after all depend upon artificial rules rather than upon the application of good sense and sound equity to the object and spirit of the contract in the given case."

We may again relieve ourselves from refinements and candidly ask what was the intention of the Legislature, the grantor and lawmaker in this case?

It makes no difference what the grantee's intention was; he was relying upon the statute under which he bought, and if he misconstrued it, it is his own misfortune and lack of prudence.

No case has held otherwise than that the great principles of construction must be assumed to be known to the grantee, and the final test of the applications of the rules and principles of construction is to ascertain the intention of the statutory grantor.

It was further contended in the State court that sections 10-15 of the Act of 1887, with regard to the issuance of the bonds secured by mortgage, indicated that the Legislature had passed absolute title, except as to the proviso in section 1, yet we find, upon reference to the mortgage itself securing these bonds, which was made before the trustees put a pick-axe or spade to the work of continuing the digging of the canal, that such mortgage specifically recites that it is given "subject, nevertheless, to the performance of the conditions, limitations, provisos, and exceptions set forth and prescribed in the act of the General Assembly of said State as above mentioned" (Act of 1887).

Their citations of authority that a court of equity will never declare a forfeiture when the parties cannot be put *in statu quo* cannot be applicable to the Acts of 1887 and 1890. The State and this company cannot be put *in statu quo*, but the defendant corporation can suffer no loss when it has been deriving large rentals upon contracts for power and when it was practicable for them for a long time to have widened the canal below Gervais street, as required by statute.

The reservation of 500 horse-power of water power to Sullivan Fenner was entirely contingent upon the canal

being completed south of Gervais street and only when and not within any definite time. We can only say there was no obligation upon the State to do so until the canal was completed. If the purchaser and its successors voluntarily assumed to do so beyond the contract, the terms of which are not of record, it is their own act and doing and not that of the State; and so it is when the facts are developed with regard to the said 500 horse-power to be furnished to the city of Columbia at any point from its source to Gervais street the city may select, for it will be noted, by reference to the contract with Wallace, that certain conditions existed for which the State was receiving no compensation and which was a mere gratuitous gift, without consideration to the city, and following the decisions of the Supreme Court of South Carolina in 43 S. C., 154, with regard to the construction of a power station, it may well be considered as a reservation to the city without any consideration from the defendant corporation. So that the point here made, that the State had been receiving something from the defendant corporation and its predecessors, is entirely without merit.

The decisions above cited show that the State had the absolute right to dispose of its own 500 horse-power of water power and it was subject to sale and assignment, and the Legislature ratified the assignment by special act and recognized the right independent of the act of 1887 as a reservation and had never passed by any purchase whatever. To the same effect the decisions of the Supreme Court of the State and of the United States.

The $60,000.00 paid by the Columbia Water Power Company to the Board of Trustees of the Columbia Canal accrued necessarily after the Act of 1887 and there is no evi-

dence that a single cent of this payment ever went into the State treasury or was used by the State or any of her officers. We may infer, however, that the Board of Trustees used this money along with the proceeds of the $200,000.00 bond issue towards enlarging and developing the canal.

We have already referred to the bond issue and shown that that was absolutely subject to these conditions.

A careful study of the Legislative history and of the conveyances made in this case will show that counsel in his contention is stating that it would be to the dishonor of the State of South Carolina if it should pocket the fair consideration that it has received and then quibble as to the obscurities and implications of its own contract was using language which created an erroneous implication and is unjustified from the facts. While, on the contrary, it will be characteristic of their own language for them to have pocketed large rentals which they have received and have started a new enterprise which, at the time this act of 1917 was passed, caused the abandonment of the canal, income from the canal was decreased thousands of dollars, and in fact decreased to nothing (p. 96).

The purchasers under this act have received the income and have had it in their pocket or expended it for other purposes. They have entered into issues of bonds providing adequate means to pay up all the contracts and liabilities of the Board of Trustees, and they have used the property as auxiliary to their other enterprises, for which the State has received no return. The case, therefore, cannot lie in justification for the position taken under it.

Counsel in argument states that because the Board of Trustees was authorized to sell or lease lands on the canal to

be used for manufacturing purposes or to facilitate the navigation of the canal evidences that such land was held as an incident to the canal and under the same authority and title that they held the canal itself, and if the latter was subject to a condition so was the former. We do not deny this proposition as to the canal and its embankments or its necessary appurtenances. If the duties and liabilities which were assumed by the purchasers and their successors were not fulfilled and no adequate remedy was reserved in the State, such property would pass away from the State never to be returned; but all of these conditions were made subject to the conditions, liabilities, and exceptions mentioned in the act.

It is contended that Judge Woods, in his decision in State *ex rel.* Lyon, *supra*, in using the word "condition" was inadvertent. On the contrary, it was deliberately chosen and judicially expressed. A limitation of an estate is where upon the happening of an event the estate immediately so limited vests according to the terms of the instrument. A condition subsequent is where the title revests after a proper re-entry. The estate continues until the re-entry is made or the forfeiture declared.

The idea that the words "subject to the duties and liabilities," contained in the 23d section of the Act of 1890, omits the word "condition" does not, to us, seem to be serious. If "duties and liabilities," referring to an act, does not cover all the conditions and limitations, we hardly can conceive of any language that would cover it.

> "Having in mind the purposes and subject-matter of the grant, let us consider the words thereof. It was made, 'subject to the performance of the conditions and limitations herein prescribed.' These words are

apt and sufficient to manifest the intention that the continuance of the estate granted was to depend upon the doing of the things prescribed, in other words, to make performance of them conditions subsequent, the breach of which would result in forfeiture."

The Act of 1917 was distinctly not given force and effect as a legislative adjudication of forfeiture. It was not offered, admitted, or relied upon as evidence to prove plaintiff's case. The contract was not impaired and defendant was not deprived of due process of law thereby.

Our duty to the State and her Legislature requires us to assert that the statements in defendant's brief, bottom of page 31 through second paragraph page 32, are entirely imaginary, the facts having either been overlooked or disregarded.

Under the Act of 1917, defendant was given ninety days in which to make arrangements or agreements with the Canal Commission proper to protect the interest of the State. Section 6 of that act provides that the Canal Commission may receive proposals for the completion of the canal by *any one* taking over or *holding the same* according to the plans heretofore specified or upon such modified plans as they deem advisable and report to the General Assembly for its approval at the next session as provided by section 5.

In response to inquiries by the Canal Commission, if defendant had any proposal to place before the Commission proposing to complete the canal and carry out the contract with the State (p. 152) or carrying out the contract in accordance with its (defendant's) construction (p. 154), if the contract was susceptible of different constructions, the Commission

was met with the reply: "We deny any liability for the completion of the canal and claim that we have fulfilled our duty in the premises entirely" (p. 154). Thereafter this action was commenced.

The passage of the Act of 1917 was doubtless like a bombshell from a clear sky to defendant when we recall the continued success it had in influencing the postponment of legislative action by suggesting and proposing the doing of several things in lieu of performing its obligation to complete the canal. The long-drawn-out dickering was brought to an end by the Act of 1917, no doubt a very surprising event to those who had theretofore succeeded in preventing action. The Supreme Court of South Carolina held on the first appeal (p. 215):

> "The Act of 1917 violates no constitutional right of defendant. The Legislature did not undertake to adjudicate anything, but merely declared that, in its opinion, a forfeiture had been incurred, and directed a judicial investigation and determination of the question in accordance with law. The action is to enforce the obligations of the contract and not to impair them."

And, in the language of defendant, what did the trial court do? It heard all of the evidence of plaintiff and defendant and upon the uncontradicted, indeed admitted, facts directed a verdict for the State. As said by the trial judge:

> "The testimony shows that the canal has never been completed below Gervais street or between Gervais street and Rocky Branch" (p. 205).

So much is admitted by the answer (p. 137). The trial court ruled (p. 204):

> "The declaration of the General Assembly that failure to complete the canal within the time mentioned was a failure to fulfill the conditions contained in the grant, is entitled to some respect, *but the court in this proceeding has the right to inquire into the facts and determine whether or not the facts as found by the Legislature were true.*"
>
> "And under the evidence showing the time that would have been taken to complete the work had it been started and the circumstances and conditions surrounding the parties and the canal since 1894 it seems to me that the court must conclude that the finding of the General Assembly was justifiable and not arbitrary" (p. 204).

The Supreme Court of South Carolina on the first appeal, purely as a matter of construction of the Act of 1887, held that the grant was made "subject to the performance of the conditions and limitations herein prescribed." That "these words are apt and sufficient to manifest the intention that the continuance of the estate granted was to depend upon the doing of the things prescribed—in other words, to make performance of them conditions subsequent, the breach of which would result in a forfeiture" (p. 214).

The Supreme Court further ruled:

> "Whether a *reasonable time* has in fact elapsed and whether under all the circumstances the drastic remedy of forfeiture should be adjudged without giving further time are questions upon which we express no opinion since they are matters of defense and will depend upon the facts and circumstances developed at the trial" (p. 215).

The trial on the merits thereafter took place. Numerous witnesses on both sides gave their testimony, both State's and defendant's witnesses agreeing that two years were ample time in which to complete the work of enlarging the canal from Gervais street to Rocky Branch; that defendant was amply able to pay the cost, and nothing was shown to exist or to have transpired that would hinder or delay performance.

The trial court ruled that the Act of 1887 required the canal to be completed to Gervais street by December 21, 1894, or seven years after the passage of the act, and the rest of the canal to Rocky Branch as soon thereafter as is practicable, and that the Act of 1887 contemplated completion before December 21, 1918 (this latter date for the reason that the Act of 1887 expired by its own limitation at that time, see sec. 24, Act of 1887); that the Act of 1887 contemplated that defendant act promptly, with reasonable promptness, in proceeding to complete the canal; that "the only inference to be drawn from the testimony in this case is that the defendant and its predecessors in title have failed to perform this condition, which I have just stated, in the grant under which they held the Columbia Canal and, therefore, that the Legislature was justified in declaring the canal forfeited to the State by the Act of 1917" (p. 205).

It thus appears that no presumption, either of law or of fact, was based on the Act of 1917. The act itself was subjected to the test of the law and the evidence given by opposing witnesses, and upon that test the Legislature was justified in declaring the forfeiture, which could be done in behalf of the State in no way other than by the adoption of an act.

Defendant's brief, page thirty-three, contains the statement: "This State succeeded because its own self-serving declaration was admitted in evidence and held to be *prima facie* conclusive truth of the facts declared." This court will search the record in vain to find the least basis or color of excuse for such statement. The State has complied with all of the rules cited on page 35 of defendant's brief.

The trial court, independently of the Act of 1917, determined the legal obligation contained in the grant "and shall as soon as is practicable complete the canal, etc.," which was in accordance with the State Supreme Court's decision on the first appeal (p. 215) and with the construction placed thereon by defendant's answer (p. 37), and the evidence—that is, the statements of witnesses and the documents which were offered by the State and formally admitted in evidence—shows conclusively that the conditions of the grant had been broken. It was wholly unnecessary to base any presumption of law or of proof upon the Act of 1917, and we submit that such was not done by the court. That act may be entirely eliminated, except so much as may have been necessary to show that the State claimed a forfeiture just as an individual would do, and the direction to the Attorney General to institute legal action to enforce the same, and yet the evidence conclusively shows the right of the State to the forfeiture.

If a new trial should be ordered or this whole proceeding declared void and dismissed because an improper force and effect has been given to the Act of 1917 or because that act is entirely void, might not the State, after elimination of the act, direct her Attorney General to bring another action and upon the same evidence appearing in the transcript of

record herein as formally admitted by the court, establish and enforce the forefeiture? If this be true, and we believe it to be, should the State be required to go into court again and go through the formalities of offering the same evidence to assert her right?

It was entirely unnecessary for the trial judge to assign any person to the jury for directing the verdict. It is sufficient if the court of review shall find legal and competent evidence and the law to justify the direction.

Before re-entry the State made demand that the condition subsequent be performed. After demand and after defendant's repudiation of all obligations, action was commenced.

The Act of 1887 is of itself a continuing obligation, demand and law requiring performance without further burden upon the State. But the State has, as an act of grace, long after a reasonable time had elapsed by the solemn enactment of 1917, called to the attention of the defendant that a reasonable time had elapsed, and that it would claim forfeiture within ninety days after the passage of the act unless the defendant should agree to perform its contract as stipulated or in some modified way as might be agreed upon. Besides, under the Act of 1917 the Canal Commission demanded performance before re-entry and before bringing suit (pp. 142, 152-4). The defendant repudiated its obligation and refused to perform (p. 154).

There is an unbroken line of authority for the proposition that a demand for performance of any contract is unnecessary where there is a refusal of performance by the party sought to be charged with the default. 3 Elliott on Con-

tracts, sec. 2098; 6 R. C. L., Contracts, sec. 326, pp. 946-947; McQueen *vs.* Smith, 24 S. E., 412.

There is no statute or decision in South Carolina to the effect that where no time is fixed for performance of a condition no default can ordinarily attach until after demand and refusal to perform. The suggestion of the South Carolina Supreme Court in the first appeal (112 S. C., 540), that there is authority for such proposition, is based on Elliott on Contracts, section 2098. Reference to the above citation will show that the word "condition" was not used—that the word "contract" was used—the author referring to contracts generally and not to conditions subsequent. Tracing the rule laid down by the author through the cited authority, *Gammon vs. Bunnell,* 22 Utah, 421; Warvell on Vendors, vol. 2, page 774, subject "Specific Performance," to its origin; *Mather vs. Scales,* 35 Ind., 3, we find the rule stated: "An action cannot be brought on a covenant or agreement to convey real estate as a general rule until there has been demand for such conveyance." This rule has no application in a case of condition subsequent, the violation of which works a forfeiture.

> "The authorities are uniform to the effect that the condition of the deed is a condition subsequent; that no formal demand of performance is required, and that the failure to perform the condition by the grantee within a reasonable time works a forfeiture."
>
> Norton *vs.* Valentine, 151 App. Div. (N. Y.), 292-294.
>
> Royal *vs.* Aultman Taylor Company, 2 L. R. A., 526.
>
> Ga. R. R. & B. Co. *vs.* Mayor, etc., of Macon, 13 S. E., 21.
>
> Mishew *vs.* Lumber Corp., 98 S. C., 23-24.

The procedure for grantor reclaiming lands for condition broken is laid down in Blackstone (Sharswood), vol. 1, book 2, page 155, as follows:

> "But when an estate is, strictly speaking, upon condition in deed (as if granted upon express condition to be void upon payment of forty pounds by grantor or so that the grantee remains unmarried or provided he goes to York, etc.), the law permits it to endure beyond the time when such contingency happens unless the grantor or his heirs or assigns take advantage of the breach of the condition and make either a re-entry or claim in order to avoid the estate."

Under the rule so laid down it is necessary in order to reclaim the estate in full for the grantor or his heirs or assigns to take advantage of the breach of the condition by making either a re-entry or claim.

The rule as stated in Blackstone is stated more fully as applicable to the instant case in Schulenberg *vs.* Harriman, 22 L. Ed. (U. S.), 555.

> "In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant the right must be asserted by entry or its equivalent. If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding of fact of forfeiture and adjudging the restoration of the estate on that ground or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and ap-

propriation of the property, or that it be offered for sale or settlement. At common law the souvereign could not make an entry in person, and, therefore, an office found was necessary to determine the estate. But, as said by this court in a late case: 'The mode of asserting or of resuming a forfeited grant is subject to the legislative authority of the Government. It may be after judicial investigation or by taking possession directly under the authority of the Government without these preliminary proceedings.'"

See Schlesinger *vs.* Kansas City, etc., Co., 152 U. S., 444; 38 L. Ed., 507.

"Actual entry, or if that impossible, by a claim, was the original mode of enforcing forfeitures, * * * We have no authority which authorizes this Court to modify this principle."

Hammond *vs.* R. R., 15 S. C., 34.
Kibler *vs.* Luther, 18 S. C., 606.
First Presbyterian Church of Beaufort *vs.* Elliott, 43 S. E. R., 674.
White *vs.* Britton, 56 S. E. R., 233; 75 S. C. 428.

In the last-cited case Justice Woods says:

* * * "It has come to be considered that any explicit assertion of forfeiture and claim of possession will be sufficient if actual entry might result in a breach of the peace or if for any other cause it is not to be reasonably expected."

Under the authorities above cited when the condition is broken the right of grantor to re-enter is complete and he

needs only to exercise his option to reclaim the estate. The failure of the above authorities to mention demand was scarcely an oversight. If demand of performance of a condition subsequent is necessary, and such demand certainly cannot be made until after the lapse of a reasonable time, then it must follow that grantee must be given a reasonable time to perform after the demand; otherwise the demand would serve no purpose. The further reasonable time in addition to the reasonable time provided under the Act of 1887, which has long since lapsed, would give grantee doubly a reasonable time.

There was no error in the construction placed upon the condition contained in the Act of 1887, "and shall as soon as is practicable complete the canal, etc."

The State Supreme Court on the first appeal construed the above as a condition to be determined within a reasonable time—"Whether a reasonable time has in fact elapsed * * *" (p. 215).

Thereafter and in the light of this decision defendant's answer states, page 37:

> "The requirements of said act (referring to the Act of 1887) as to the extension of said canal to said Congaree River as aforesaid is indefinite as to *time* within which the same must have been done. * * *"

In the second decision of the State Supreme Court, while referring to the first decision, we find:

> "It was also held that no time for the completion of the canal from Gervais street to Rocky Branch, the lower terminus, was fixed by the statute and therefore a reasonable time was allowed."

Defendant's position as to performance, "as soon as practicable" or within a reasonable time, is that it must depend upon and be determined by the additional profits might receive from additional power to be developed by extension of the canal; that such time will never elapse fore a fair profit is assured it by reason of the extension; th as soon as is practicable or a reasonable time has not and w never elapse because the United States Government has bu a dam across the Congaree River above Rocky Branch, whi ponds water in the river up to Gervais street sufficient f boats to proceed so far (though evidence shows that the da failed in its purpose, and that there was no purpose or a tempt by this Government work to conect the Broad and Co garee rivers or to provide connection with the completed pa of the canal); because one boat line on the river had fail and another, for the time, suspended service and river tran portation generally the world over was on the wane; becau at periods of low water there are two or three places in th Congaree River where navigation is impeded; because ra road rates are cheaper than water rates (though the contra was proven in this case), and because it is not now desirab to build mills between the canal and river in view of moder transmission of electric power.

If defendant's position is found to be correct, then it wi never be practicable, a reasonable time will never elapse, fo the performance of the obligations, and such defenses may b successfully interposed to any action the State might bring t enforce performance while defendant is enjoying the poss sion and revenues of the property and while all possible nav gation between the Broad and Congaree rivers is destroyed b the permanent dam across Broad River at Bull's Sluice an the incompleted canal.

Our position is that defendant is not in the least concerned whether the State may or may not accomplish its purpose or receive any benefits by the completion of the canal.

Section 3 of the Act of 1887 provides and requires that the entire canal be enlarged so as to carry a body of water of certain dimensions, and section 7 provides that it shall within two years be completed so as to carry the prescribed body of water from its source to Gervais street, and authority was given to build all necessary banks, abutments, and other structures on both sides of the river as may be required to complete the canal.

Section 1 of the Act of 1890, amending section 3 of the Act of 1887, repeated the above provisions and by further proviso required the completion of the canal below Gervais street so as to carry a smaller volume of water in accordance with smaller dimensions than are required in the Act of 1887.

It therefore appears that when the Legislature provided "and shall, as soon as is practicable, complete the canal, etc.," it referred purely and solely to the actual physical construction—that is, building banks, abutments and other structures, widening and deepening the canal in conformance with the required dimensions, and that this "shall" be done—completed—as soon as is practicable—that is, a reasonable time should be allowed to do the work of making the canal wider and deeper.

In addition to the above, the Act of 1887 (*sec. 24*) expired by its own limitation after a period of 31 years, and certainly it contemplated that a reasonable time, or "as soon as is practicable," should fall within the 31-year period, or not later than 1918, and the trial judge so ruled in 1920, about 18 months after the expiration of the act.

There being no conflict of testimony, the court proper directed the verdict.

Hepner vs. U. S., 213 U. S., 115.
Earnshaw vs. U. S., 146 U. S., 60-67.
Standard Oil Co. *vs.* Van Etten, 107 U. S., 325-33
Nunez *vs.* Dautel, 19 Wall., 560-562.
Farmer *vs.* Sellers, 89 S. C., 498.

If it be conceded, and we do not so admit, that the defendant has offered testimony tending to show that the completion of the canal would be of little or no benefit to the State, it nevertheless appears that the purposes sought to be accomplished and the benefits expected to accrue to the State are fixed by the Act of 1887 as the prime consideration for the grant, to wit, improved navigation from the Congaree River into the canal near Rocky Branch through the whole length thereof and into Broad River.

There was no evidence that the canal, if now completed, would not serve the purpose or use contemplated by the Act of 1887, and the dominant purpose and condition not having been complied with the lesser and incidental benefits that may be received by the State—and there were none such—cannot effect an avoidance of the forfeiture.

> "The courts will not consider the hardships or the expense or the loss to one party or the meagerness or the uselessness of the result to the other. They will neither make nor modify contracts nor dispense with their performance. When a party by its own contract creates a duty or charge upon himself he is bound to the performance of it because he promised and did not shield himself by proper conditions or qualifications." Cameron-Hawn Realty Co. *vs.* City of Albany, 101 N. E., page 163.

"Conditions subsequent in deed are good whenever their performances are not impossible or do not afterwards become so by act of God or of the grantor, and they are not contrary to the law nor repugnant to the deed." Taylor *vs.* Sutton, 60 Am. Dec., 682.

Justice Day, in commenting upon a prior decision of the court, said:

> "It certainly was not intended to question the principle, frequently declared in the decisions of this court, that if a party charges himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail."
>
> Columbus Railway, P. & L. Co. *vs.* Columbus, 249 U. S., 412; 63 L. Ed., 678.

The Case Was Not Removable.

The complaint sets up no right, title, or interest given or arising under any statute or constitutional provision of the United States. The only right asserted is based upon the statute of the State.

We feel that defendant has practically abandoned its contention that this is a removable case, as it will appear upon an examination of the only case cited, Smith *vs.* Kansas City, etc., 255 U. S., 180, that the rights claimed by the plaintiff in that case were based upon the Constitution of the United States and the case was brought to test the validity of the Federal Farm Loan Act.

Plaintiff relies on the cases cited and the reasons assigne in the orders of Judge Memminger, of the State court (p 19), and of Judge Smith, of the United States District Cour (p. 22), to wit, Taylor *vs.* Anderson, 234 U. S., 74; Arkan sas *vs.* Kansas and Texas Coal Co., 183 U. S., 190.

Act of 1818.

An Act to Appropriate and Set Apart One Million of Dollar for Internal Improvements and for Other Purposes Therei Mentioned (6 *Stat.*, 91).

WHEREAS, it is expedient to appropriate one million of dol lars for the internal improvement of the State:

I. *Be it therefore enacted by the Senate and House of Rep resentatives, now met and sitting in General Assembly, an by the authority of same,* That the faith of the State is hereb pledged to appropriate and set apart one million of dollar for the internal improvement of the State and that the sum of two hundred and fifty thousand dollars, annually, be, and the same is hereby, appropriated for the term of four years to be paid out of the annual balances in the treasury, and from the yearly dividend of the bank of the State of South Carolina.

II. *Be it further enacted by the authority aforesaid,* That the said sum of two hundred and fifty thousand dollars, per annum, for the term of four years, shall be laid out and ex pended in improving the navigation of rivers, and other wate courses of the State, in opening and constructing turn-pike roads, in cutting canals, and in such other works as will facili tate the transportation of the productions of the soil to mar ket, in such manner as shall be prescribed by the Legisla ture.

In the Senate House, the sixteenth day of December, in the year of our Lord one thousand eight hundred and

eighteen, and in the forty-third year of the Independence of the United States of America.

JAMES R. PRINGLE,
President of the Senate.
ROBERT Y. HAYNE,
Speaker of House of Representatives.

Act of 1819.

An Act to Establish a Board of Public Works (6 *Stat.*, 124).

WHEREAS it is expedient to establish a Board of Public Works, in order to carry into effect the internal improvements contemplated by the Legislature, to collect such facts and information as may be necessary to an enlightened decision, and to promote the internal improvement of the State.

VIII. *And be it further enacted by the authority aforesaid,* That the said Board shall have power to purchase for the State, in fee simple, such lands as may be necessary for the purposes contemplated by this act; and when they and the owners of the soil can not agree, to take the same at a fair price, by the appraisement of five persons, or a majority of them, to be appointed by the Court of Equity or Common Pleas, to value the same; and such appraisers, before they proceed to execute the duties assigned them, shall severally take and subscribe an oath or affirmation, faithfully and impartially to discharge the trust or duties assigned them—which oath shall be filed by the Secretary of the Board of Public Works, in his office; and it shall be the duty of such appraisers, or a majority of them, to make a fair estimate of the loss and damage, if any, over and above the benefit and advantage accruing to the party concerned, by the making and constructing of the works intended; and the said appraisers, or a majority of them, shall make a regular entry of their proceedings in each particular case, in a book or

books to be kept by the Board for such purposes—which entry shall contain an apt and sufficient delineation and description of the premises to be appropriated to public use, the value thereof, and the loss, if any, to the owner of the soil by the detraction or taking away of the part appropriated to public use, and the construction of the works intended—to all of which the said appraisers shall sign their names; and the Commissioners shall pay the sum which shall be assessed to the owner of the soil, and the fee simple of the premises so appropriated to public use shall be vested in the State; and the Board shall in like manner have power and authority to take, for the use of works intended, any materials in the vicinity thereof; to take and collect water for the like purposes, and, if need be, to girdle or destroy trees standing or growing near any navigable waters, and injurious to the navigation and free passage thereof, paying in all cases for such use and application to public services of private property, a reasonable price, to be ascertained in like manner as the value of the soil, where the Board and owners cannot agree, is to be ascertained by this act.

Act of 1822.

An Act Concerning the Internal Improvement of the State (6 *Stat.*, 189).

I. *Be it enacted by the honorable the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same,* That the Board of Public Works, be, and the same is hereby, abolished, and, in lieu thereof, that there shall be a Superintendent of Public Works annually elected by joint ballot of both branches of the Legislature, who shall have power and authority to appoint and remove at his pleasure, one engineer, for whose skill and conduct the said superintendent shall be responsible.

II. And be it further enacted by the authority aforesaid, That the superintendent of public works shall be, and he is hereby declared to be, the successor of the Board of Public Works, and shall have and possess all of the powers, and perform all the duties, now performed and exercised by the Board of Public Works, with such restrictions as are hereinafter expressed.

III. *And be it further enacted by the authority aforesaid,* That the Superintendent of Public Works shall give bond, with sufficient security ,to be approved of by the Comptroller, in the sum of fifty thousand dollars, for the faithful performance of the duties of his office, and shall receive, annually, a salary of three thousand dollars, payable quarterly.

IV. *And be it further enacted by the authority aforesaid,* that the engineer shall perform all such duties in relation to the internal improvement of the State, as shall be required of him by the Superintendent of Public Works, and shall receive as a compensation, annually, the sum of twenty-five hundred dollars, payable quarterly.

V. *And be it further enacted by the authority aforesaid,* that the Superintendent of Public Works shall hereafter commence no work whatever, until the same shall be fully and particularly examined by him or the engineer, and shall be reported to the Legislature with detailed estimates thereof, and shall be by the Legislature ordered and directed to be undertaken.

VI. *And be it further enacted by the authority aforesaid,* that whenever any assessment of property, necessary for the internal improvement of the State, shall have been made, pursuant to the Acts of the General Assembly heretofore passed on that subject, the said assessment shall not be paid until the same shall have been approved of by the Legislature; unless when the land or materials have been taken or destroyed previously to the passing of this Act.

VII. *And be it further enacted by the authority afore-*

said, That the Superintendent of Public works be, and he is hereby, authorized to convey to Michael Collins and Michael Conner, in fee simple, so much of a tract of two hundred acres of land, situated between Fishing Creek and Catawba River, as may not be required for the Catawba Canal, which land was conveyed to the State of South Carolina by Samuel McCreary, on the said Michael Collins and Michael Conner's performing their agreement with the Board of Public Works.

VIII. *And be it further enacted by the authority aforesaid,* That the Superintendent of Public Works be authorized to convey to Jacob J. Faust and Manuel Antonio, thirty feet of the west side of Gist street, in the town of Columbia, extending from Senate street to the tow-path of the canal; and so much of Senate street as lies between the road hereinafter mentioned and the Congaree River; and so much of Gist street as lies between the said road and the branch which passes between Pendleton and Medium streets—whenever the said Jacob J. Faust and Manuel Antonio shall convey to the State of South Carolina such parts of the two squares owned by them, lying between Senate, Gist, and Medium streets and the Congaree River, as are covered by the Columbia Canal and tow-paths thereof, and by a road twenty-five feet wide, running on the west side of the said canal from Senate street to Levy's brick yard.

IX. *And be further enacted by the authority aforesaid,* That the Supertendent of Public Works be authorized to convey to Chapman Levy, Esquire, so much of Green and Medium streets, as is situated between a line drawn parallel to the center of the Columbia Canal, at the distance of thirty feet therefrom, and the Congaree River; and so much of Gist street as lies between Green street and the Branch which passes between Medium and Pendleton streets—whenever and so soon as the said Chapman Levy shall convey to the State, so much of two squares, situated between Pendleton, Williams, Medium and Gist street, and the other between

Medium, Williams, Green and Gist street, as is covered by the said canal and the tow-paths thereof, extending thirty-three feet on each side, from the center of the said canal.

X. *And be it further enacted by the authority aforesaid,* That the superintendent of public works be authorized to convey to Nicholas Herbemont, the lots numbered one and two, six and seven, in the plan of the lots laid out by the said Board of Public Works, at the second basin of the Columbia Canal, when and so soon as the said Nicholas shall have conveyed to the State so much of the square in the town of Columbia, lying between Senate, Gist, Gervais, streets and the Congaree River, as is covered by the said canal and the basin, and a tow-path eight feet wide, on each side of the canal; and also, by a road twenty feet wide, leading from Daniel's mill to Senate street.

XI. Whereas John Waring conveyed to the State, without compensation, for the use of the canal, a part of two squares in the town of Columbia; and whereas, since the construction of the said canal, it is found that so much of the square situated between Lady, Gist, Gervais and Williams streets, as he thus conveyed, is not necessary to it:

Be it therefore enacted by the authority aforesaid, That the Superintendent of Public Works be required to reconvey to the said John Waring, the part of the said square thus found not to be necessary to the said canal.

XII. *And be it further enacted by the authority aforesaid,* That the Superintendent of Public Works be authorized to convey to William Edward Hayne so much of the streets in the town of Columbia as are included within the following limits, viz: beginning on the Congaree River at the center of Tobacco street, running up the center thereof to the east side of Huger street; thence along the said east side to the north side of Blossom street; thence on the said north side to the east side of William street; thence along the east side to the south side of Green street; thence

along the said south side to the Congaree River, and thence down the said river to the beginning corner; excepting therefrom all the land contained between two lines, running parallel to the center of the Columbia Canal, at the distance of thirty-three feet therefrom; and also excepting such streets as adjoin a square bounded by Gist, Blossom and Wheat streets and the Congaree River—when and so soon as the said William Edward Hayne shall have conveyed to the State, so much of the land contained within the above described limits as is covered by the said canal and tow-paths thereof, extending thirty-three feet from the center of the said canal; and the said Superintendent of Public Works, in making the said conveyance to the said William Edward Hayne, shall reserve a free right of way from the square bounded by Gist, Blossom and Wheat streets and the Congaree River.

XIII. *And be it further enacted by the authority aforesaid,* That the Superintendent of Public Works be authorized to convey to Benjamin F. Taylor, Esquire, so much of the streets in the town of Columbia, as are contained within the following limits, viz: beginning on the Congaree River on the south side of Lower stret; thence on the said south side to Lincoln street; thence on the west side of Lincoln to the north side of Indigo street; thence on said north side to the east side of Pulaski street; thence on the said east side to the center of Tobacco street; thence on the said center to the Congaree River; and thence by the river to the beginning corner; reserving therefrom so much of the said streets as are covered by the Columbia canal, and the tow-paths thereof, extending thirty-three feet from the center of said canal; when and so soon as the said Benjamin F. Taylor shall have paid to the said Superintendent of Public Works fifty dollars per acre, for all the streets thus to be conveyed to him; and also shall have conveyed so much of his lots within the limits aforesaid as are covered by the said canal and the tow-paths thereof, extending thirty-three feet from the center of the said canal.

XIV. *And be it further enacted by the authority aforesaid,* That the Superintendent of Public Works be authorized to sell or exchange any of the lands acquired by the State from the Catawba Company lying on the Wateree River, between the mouth of Col's Creek and Chestnut Ferry, and a line drawn parallel to the said river, at the distance of two miles west of the said river, subject to the sanction of the Legislature.

XV. *And be it further enacted,* That the Superintendent of Public Works be authorized to employ a surveyor to run out all the land belonging to the State, on the west side of the Catawba River, in the vicinity of Mount Dearborn and Rocky Mount, and that they report to the Legislature, at their next session, the quantity and qualities thereof, and what part in their opinions it is necessary to reserve for the works in that neighborhood, and what part may be advantageously sold.

XVI. *And be it further enacted,* That the Superintendent of Public Works be authorized to sell at public auction, after one month's public notice, on a credit of one and two years, with personal security, taking a bond and mortgage of the premises, all the lands belonging to the State, or to the Board of Public Works, on the State road, between the Saluda River and the North Carolina line; and also, so much land as belongs to the State, on the road between the North Carolina line and Green River: *Provided,* that in making the said sale, there shall be reserved at least thirty feet on each side of the center of the said road, and also the right of taking from the premises sold, stone for the repairs or reconstruction of the said road, and the bridges, drains and culverts thereof.

XVII. *And be it further enacted,* That the Superintendent of Public Works be authorized to lease, by private contract, for terms not exceeding ten years each, all the lands belonging to the State on Saluda Canal, and that he be required to insert in the said leases, a clause or clauses stipu-

lating that the tenant or tenants shall not be permitted to suffer hogs, cattle, horses, or any other stock, to have access at any time to the said canal, or to the banks thereof, within eight feet of the margin of the water in the canal.

XVIII. *And be it further enacted by the authority aforesaid,* That the Superintendent of Public Works be authorized to convey to John Whitaker, Esquire, so much of the land acquired by the State from the Catawba Company as lies between the Wateree Canal and the Wateree River, and the upper and lower line of his planation through which the canal passes, in part compensation for the lands surrendered by him to the State for the use of the said canal.

XIX. *And be it further enacted,* That the Superintendent of Public Works be, and is hereby, authorized to make exchanges with the proprietors of lots on the upper basin of the Columbia Canal by which the said proprietors may acquire a front on the water thereof, and the State may acquire an extension of the ground owned thereby, sufficient for the erection of warehouses and streets leading to and from the same, which shall be subject to the sanction of the Legislature.

XX. *And be it further enacted,* That the Superintendent of Public Works do cause a plan of the lots laid out by the Board of Public Works at the second basin of the Columbia Canal, to be recorded in the Surveyor General's Office, there to remain a public record; and that the said lots, notwithstanding they may be partly or in the whole in the streets of Columbia, shall be vested in the State; and that the street so laid out be, and hereby is established as, one of the public streets of the town of Columbia.

XXI. *And be it further enacted,* That the lots and streets laid out by the Board of Public Works, on the third basin of the Columbia canal, be recorded in the Surveyor General's Office, there to remain as a public record, and that the said street be declared a public street of the town of Columbia.

XXII. *And be it further enacted,* That the superintendent of public works, and his successors in office, be, and he is hereby, authorized, from time to time, to rent out on leases, not exceeding fifteen years, all the lots belonging to the State on the Columbia Canal, or the basins thereof, on such terms, and upon the reservation of such rents, as he may deem most for the interest of the State: *Provided,* that in all leases hereafter to be made, the same shall be done at public auction, after one month's public notice thereof, except where proposals for leases have already been made and accepted by the Board of Public Works, and except on the renewal of any lease made in pursuance of any stipulation therein contained; and that the rents received on the said leases do constitute a fund for the support of the said canal until otherwise ordered by the Legislature.

XXIII. *And be it further enacted,* That the Superintendent of Public Works be authorized and required to lay out and establish a public landing on the Catawba River, on lands belonging to the State, between the mouth of Rocky Creek and Farrar's landing; and also to lay out and establish lots on and adjacent to the said public landing, for the erection of warehouses and other buildings, and to rent out the said lots at public auction, after one month's public notice, on such terms as to him may appear most to the interest of the State; and that the Superintendent of Public Works do return a plan of the said landing and lots to the Surveyor General's Office, there to be recorded and made a public record.

XXIV. *And be it further enacted by the authority aforesaid,* That the Commissioners of the Roads for Chester District be authorized and required to lay out, make and keep in repair, a road leading from Beckhamville to the lands belonging to the State, between the mouth of Rocky Creek and Farrar's landing; and that in case Miles Farrar, the proprietor of the land through which part of the said road shall run, shall require compensation for the same, that then, and

in that case, the said Commissioners do cause an assessment o damages sustained to be made by five Commissioners, or a ma jority thereof, to be appointed by the Court of Equity o Court of Common Pleas, for Chester District, and that the return the said assessment to the Legislature at their nex session.

XXV. *And be it further enacted by the authority afore said*, That the road lately established and constructed by th Board of Public Works, leading from Camden to Belton' boat landing on the Wateree River, be, and the same i hereby, established as a public road of Kershaw District, an that it shall be the duty of the Commissioners of the road of the said District to keep the same at all times in goo repair, by the same means by which the public roads of sai District are repaired.

XXVI. *And be it further enacted by the authority afore said*, That William Whitaker, Benjamin Bineham, an George Stratford, be authorized and empowered to lay ou a public landing at or near the termination of the said road on the Wateree River; and should the proprietor, or pro prietors, of the soil on which the landing shall be laid out require compensation therefor, that then and in that cas the said Commissioners shall cause an assessment to be mad of the damages sustained, by five Commissioners, or a ma jority of them, to be appointed by the Court of Equity o Common Pleas of Kershaw District, and that the same b returned to the Legislature at their next session, for thei approbation or rejection: And the said first-mentioned Com missioners are required at the same time to report to th Legislature what charges ought to be imposed on boats o other craft, lading or unlading at the platforms, cranes o other machinery that may be erected by the proprietor or pro prietors of the soil for that purpose on the said landing.

In the Senate House, the twenty-first day of December in the year of our Lord one thousand eight hundred an

twenty-two, and in the forty-seventh year of the Independence of the United States of America.

JACOB BOND PEON,
President of the Senate.
PATRICK NOBLE,
Speaker of the House of Representatives.

Act of 1823.

An Act Concerning the Canals of this State and for Protecting and Maintaining the Same and for Other Purposes therein Mentioned (6 *Stat.*, 214).

I. *Be it enacted by the honorable the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same,* That there shall be appointed, by a joint resolution of both branches of the Legislature, or in case of failure of such appointment, or of any vacancy occurring, by the Superintendent of Public Works, a Board of Commissioners for each of the public works following, that is to say: one board to be called the Commissioners of the Columbia and Saluda canals, who shall have charge of the Columbia, Saluda and Bull Sluice canals, and all the work and property attached thereto; one other board, to be called the Commissioners of the Drehr Canal, who shall have charge of the said canal, and all the works and property thereto attached; one other board to be called the Commissioners of the Broad River Canal, who shall have charge of the canal at Lockhart's Shoals, and the works and property thereto attached; one other board to be called the Commissioners of the Landsford Canal, who shall have charge of the said canal, and the works and property thereto attached; one other board to be called the Commissioners of the Catawba Canal, who shall have the charge of the said canal, and the works and property thereto attached; one other Board to be called the Commissioners of the Rocky Mount Canal, who shall have the charge of the said canal, and the

works and property thereto attached, and of the portage around the great falls of Rocky Mount; and one other board who shall be called the Commissioners of the Waterce Canal, who shall have the charge of the said canal, and the works and property thereto attached; and each of the said Commissioners shall continue in office until another Commissioner shall be appointed in his place by a joint resolution of both branches of the Legislature.

II. *And be it further enacted by the authority aforesaid*, That as soon as any of the canals constructed at the expense of the State shall be completed, the same shall thenceforth be under the care, superintendence and control of the board to which the said canal belongs; and it shall be the duty of the said Commissioners to preserve, protect and keep in repair the same, and the locks and dams thereof, by means of the tolls and rents which shall be collected thereon.

III. *And be it further enacted by the authority aforesaid*, That the Superintendent of Public Works, with the approbation of the respective Commissioners of each canal, shall establish tolls as he may deem proper and just, to be paid by boats, rafts and other vessels passing the said canals, or on the goods or other articles on board thereof; and he is hereby authorized, with the approbation aforesaid, from time to time, to make all such rules and regulations in respect to the collection and payment thereof, in respect to the size and structure of boats, rafts or other vessels on the water of the said canal, and in respect to all matters in any way connected with the navigation thereof, and to impose such forfeiture of money on free white persons, or such stripes on slaves and free persons of color, as he and the said Commissioners may deem reasonable: *Provided*, such forfeiture shall not exceed five dollars, nor ten stripes for one offense.

IV. *And be it further enacted by the authority aforesaid*, That the Commissioners of each canal in this State which has been constructed at the public expense, shall have power to appoint one toll collector, who shall also be the lock keeper

of the said canal, and also one able-bodied bank ranger, both of whom they may remove from office at their pleasure; and the said Commissioners shall cause the said collector, lock keeper and bank ranger, to perform the duties enjoined on them by this act, and such other duties as shall be assigned them by the regulations established by the said Commissioners and Superintendent.

V. *And be it further enacted by the authority aforesaid,* That the toll collector and lock keeper of each canal shall give bond, with good security, in such sum as the said Commissioners shall order and direct, conditioned for the faithful performance of his duties; and he shall keep a regular book, in which shall be entered the name of every boat, raft or other vessel, which passes the locks of the said canal, where tolls are directed to be collected, and to enter therein the amount of toll paid on the said boat, raft or other vessel, and the goods on board thereof; and shall pay the amount thereof, at the end of each quarter of the year, and as much oftener as the Commissioners may require, into the bank of the State, or some branch thereof, or to such person as the Commissioners of the said canal may direct.

VI. *Be it further enacted by the authority aforesaid,* That when any boat, raft or other vessel, shall have passed any canal, lock or locks, whereby it shall become liable to pay any toll, it shall be the duty of the toll collector to demand and receive the said toll; and in case of the refusal or neglect of the person having charge of the said boat, raft or other vessel, to pay the same, the collector shall issue, and he is hereby authorized to issue, his warrant of distress for the amount of the toll so refused or neglected to be paid, and to cause the said boat, raft or other vessel, or so much of the goods on board thereof as he may deem necessary to secure the said payment, to be immediately distrained; and the boat, raft or other vessel, and the goods so distrained, shall be disposed of in the same manner as goods distrained for rents arrear are or may be disposed of, by the laws of this State.

VII. *And be it further enacted by the authority aforesaid*, That it shall be the duty of the lock keeper of each canal, to pass through the locks thereof, every boat, raft or other vessel, that presents itself for passage between sunrise in the morning and sunset of the evening, except in the months of July, August and September, when he shall attend at such hours as the Commissioners of each canal may require; and he shall not suffer any boat, raft or other vessel, to pass any of the locks of the canal, excepting the guard lock, but in his presence or the presence of some other person to be appointed by him, with the approbation of the Commissioners of the said canal.

VIII. *And be it further enacted by the authority aforesaid*, That when any boat, raft or other vessel, in descending from a higher to a lower level, shall pass through any lock, previously to the said boat, raft or other vessel moving into the said lock, the lock keeper shall shut the lower gates of the said lock, and the wicket gates thereof, before he shall open the upper gates or the wicket gates thereof; and after the said boat, raft or other vessel shall have moved into the said lock he shall shut the upper gates, and the wicket gates thereof, before he shall open the wicket gates or the lower gates thereof; and in ascending from a lower to a higher level, before any boat, raft or other vessel shall move into the lock, the lock keeper shall shut the upper gates and wicket gates thereof; and when it shall have moved into the said lock he shall shut the lower gates and wicket gates thereof, before he shall open the upper gates or wicket gates thereof; and in passing any boat, raft or other vessel through any lock, the keeper is hereby authorized to call to his aid all and every person or persons engaged in navigating the said boat, raft or other vessel, and such person or persons are hereby required to conform to the orders given them by the said keeper.

IX. *And be it further enacted by the authority aforesaid*, That when any boat, raft or other vessel, shall approach any

guard lock in ascending or descending, and the gates thereof shall be closed, the said boat, raft or other vessel, shall pass the same in the following manner, viz: in ascending, the lower gates and the wickets thereof shall not be opened before the boatmen have closed the upper gates and the wickets thereof; and when it shall have moved into the lock, the lower gates and the wickets thereof shall be closed before the boatmen open the upper gates or the wickets thereof; and in descending, the lower gates and the wickets thereof shall be closed before the boatmen open the upper gates or the wickets thereof; and when the boat, raft or other vessel has moved into the lock, the upper gates and the wickets thereof shall be closed, before the boatmen shall open the lower gates or the wickets thereof; and whenever any boat, raft or other vessel has passed a guard lock, the gates of the said lock and the wicket gates thereof, shall be left in the same situation they were in immediately before the passage; and each and every boatman, in passing a guard lock, shall, in every particular, comply with the regulations contained in this clause, and, on failure thereof, shall be subject to a fine of one hundred dollars.

X. *And be it further enacted*, That the several commissioners having charge of the said canals, be, and they are hereby, required to report annually, on the first day of October in each year, to the superintendent of public works, the amount of tolls collected thereon; the expense incurred in maintaining and protecting the said canals for the preceding year; and to cause the net proceeds of the said tolls to be deposited in the bank of the State, or some branch thereof; and the said commissioners and superintendent shall report to the Legislature, annually, the amount of net tolls so collected, and in what bank the same shall have been deposited.

XI. *And be it further enacted*, That any person who shall ride, lead or drive any horse, mule ox or other cattle, or any cart, wagon or other carriage, upon the tow paths or banks of the said canals, except for the purpose of towing boats, rafts

or other vessels upon the waters thereof, and except for the purpose of conveying articles to and from the said canals, for transportation on the same, or their delivery at their place of destination, shall forfeit, for every offense, the sum of ten dollars, and pay all damages consequent upon such offense, over and above the said forfeiture; and that no animal employed in towing any boat, raft or other vessel, shall be allowed to travel nearer the margin of the canal than three feet.

XII. *And be it further enacted,* That if any person shall obstruct the navigation of any of the said canals, by sinking therein any vessel, timber, stone, earth, or any other thing or things, or in any of the basins thereunto belonging, or by placing any obstructions on any of the towing paths thereof, or on the bank opposite the towing path, such person or persons shall forfeit, for every such offense, the sum of ten dollars.

XIII. *And be it further enacted,* That if any person or persons shall wantonly and unnecessarily open or shut, or cause to be opened or shut, any lock, gate or wicket gate, water wier, or sluice gate, or drive any nail, nails, spike or wedge into either of the said gates, or take or use any other mode to prevent the perfect and free use of either of the said gates, such persons or persons, for every such offense, shall forfeit a sum not exceeding one hundred dollars, and repair all damage, at his, her, or their expense.

XIV. *And be it further enacted by the authority aforesaid,* That if any person or persons shall willfully and maliciously throw down, break or destroy, any lock, dam, bank, waste weir, culvert, wall or any part thereof, belonging to any of the said canals, such person or persons so offending, shall, for every such offense, on conviction thereof, pay all the damages arising from such breaking, throwing down or destroying, and shall also forfeit and pay a fine not exceeding one thousand dollars, and be imprisoned not exceeding twelve months, at the discretion of the court before which such conviction shall take place.

XV. *And be it further enacted,* That in all cases where any boat, raft or other vessel, passing through any of the said canals shall meet any other boat, raft or other vessel, it shall be the duty of the boatman or person having charge of the said boat, raft or other vessel, to turn out to the left hand, so far as to give each other a free passage, or as to be wholly on the left side of the center of the canal; and when such boats, rafts, or other vessels, shall approach each other in any part of the canal, which may be so narrow as to prevent their passing each other, it shall be the duty of the boatman having charge of the ascending boat, raft or other vessel, to wait at such distance from such narrow part, as may be convenient for the descending boat, raft or other vessel, to pass through such narrow part, until until such passage is effected; and each and every boatman violating the provisions of this section, shall forfeit, for every such offense, ten dollars.

XVI. *And be it further enacted,* That no person navigating any of the said canals, shall be permitted to use therein, any setting pole or shaft, and if any person shall offend against this section, he shall forfeit ten dollars.

XVII. *And be it further enacted by the authority aforesaid,* That if any boat or other floating thing, shall be so moored in any canal, as to obstruct the navigation thereof, or if any person shall obstruct the said navigation by means of loading, unloading, misplacing, or otherwise misconducting any boat or other floating thing, and shall not, immediately upon being requested thereto by any commissioner of the canal or by the lock keeper, or any agent of the commissioners, or by any person incommoded by the said obstruction, remove the same, the boatman or person who caused the said obstruction shall forfeit, for every such offense, ten dollars, over and above the expense of removing said obstruction.

XVIII. *And be it further enacted by the authority aforesaid,* That if any agent, toll collector, lock keeper, or bank manager, employed on any canal, or occupying any house,

office, building, or land belonging thereto shall be discharged from their employment, by the Commissioners of the said canal, and shall not deliver up the possession of such house, office, building or land and their appurtenances, together with all the books, papers, and other matters, belonging to the said canal, within one day next after notice of such discharge, shall be given to him or left at such house, office, or building, or if the wife or family of such agent, toll collector, keeper or bank ranger, who shall die in such employment shall refuse to deliver up the possession of such house, office, building or land and appurtenances, together with the books, papers, and other matters and things, belonging to the said canal, in his, her or their custody, power or possession, within three days after any person shall have been appointed in the place and stead of the person so dying, then, and in those cases, it shall be lawful for any Justice of the Peace, in the District where such house, office, building or lands are situated, and he is hereby required, by warrant, under his hand and seal, to order any constable or other peace officer, with such assistance as may be necessary to enter such house, office, or building or upon such land, in the daytime, and remove the persons who shall be found therein, together with their goods and chattels out of such house, office, or building, and off and from such land, and to take possession of all the books and papers, matters, and things belonging to the said canal, and to deliver possession of the same to the new-appointed agent, toll collector, lock keeper or bank ranger.

XIX. *And be it further enacted,* That all penalties and forfeitures, created by this Act, exceeding twelve dollars, shall be recovered by indictment in the Court of Sessions, in the District where the offense shall have been committed, for which such penalty or forfeiture may be inflicted or incurred, and that all offenses for which imprisonment is made the punishment, shall be prosecuted by indictment, in the Court of Sessions of the District in which such offense

shall be committed, and that all penalties and forfeitures created by this Act, of twelve dollars, or under that sum, shall be recovered before any Justice of the Peace of the District in which the offense shall have been committed, for which the said penalty or forfeiture is inflicted or incurred, and all such forfeitures shall be paid, one-half for the benefit of the informer, and the other half for the use of the canal, on account of which the said penalty or forfeiture shall be imposed.

XX. *And be it further enacted by the authority aforesaid,* That in case any slave or free person of color, shall commit any offense prohibited by this Act, he or she shall be proceeded against, charged with said offense, and tried thereor, before a Justice of the Peace and free-holders, in such manner as is prescribed for the trial of slaves in cases less than capital, by the existing laws of the State, and the justice nd free-holders are hereby authorized, on conviction by hem of any slave or free person of color for such offense, to nuse the said slave or free person of color, to be whipped, ot exceeding fifty nor less than ten lashes.

XXI. *And be it further enacted by the authority aforesid,* That it shall not be lawful for any person to keep or erect any dam across any river which the Legislature s ordered to be made navigable, or for improving which the gislature has made any appropriation, so as to obstruct the ssage of boats therein, and in case any dam now erected, hereafter to be erected, shall not be immediately taken wn and opened, when required by the Superindentent of blic Works, the same shall thenceforth be regarded and en to be a public nuisance, and shall and may be abated such, and the person erecting or keeping up the same, ll, on conviction thereof, be fined at the discretion of the rt, in a sum not exceeding five hundred dollars, for the of the navigation of the river where the said nuisance ts.

XXII. *And be it further enacted,* That the Superintendent of Public Works be required to cause another fish sluice to be constructed in the Saluda dam; *provided,* the same shall not cost more than one hundred and thirty dollars, and the said Superintendent be required to cause one or more fish sluices to be constructed in the Broad River dam; *provided,* the same shall not cost more than one hundred and fifty dollars each.

XXIII. *And be it further enacted by the authority aforesaid,* That it shall be the duty of each Board of Canal Commissioners, to cause a current of fresh water to be kept constantly running through the canal under their charge, during the months of July, August, September, and October, in each and every year, so as to prevent the water therein from becoming stagnant, and injuring the health of the neighborhood.

In the Senate House, the twentieth day of December, in the year of our Lord one thousand eight hundred and twenty-three, and in the forty-eighth year of the Independence of the United States of America.

JACOB BOND I'ON,
President of the Senate.
PATRICK NOBLE,
Speaker of the House of Representatives.

Act of 1825.

An Act to Make Appropriations for the Year One Thousand Eight Hundred and Twenty-five; and for Other Purposes. (6 *Stat.,* 277.)

11. *And be it further enacted,* That the superintendent of public works be authorized to place all the canals of the State under the direction of one of his assistants, who shall be vested with all the powers of the several boards of Canal Commissioners; and that such boards be, and they are hereby abolished.

For contingencies, in respect to the public words, three thousand dollars, if so much be necessary.

* * * * * * *

Act of 1843.

An Act to Vest the Columbia Canal in Frederick William Green for the Term of Twenty-one Years. (11 *State.*, 304.)

I. Be it enacted by the Senate and House of Representatives now met and sitting in General Assembly, and by the authority of the same, that the part of the Columbia Canal from Bull Sluice to the lower end of the lot belonging to the estate of William Briggs, be and it hereby is vested in Frederick William Green, his heirs and assigns, for the term of twenty-one years, with authority to exact and receive tolls thereon, according to the rates established by law: *Provided*, said Frederick William Green repairs the said canal and puts it in good boating order, in the course of one year from and after the passing of this Act: *And Provided*, Said William Frederick Green or his assigns, cause an outlet or waste-way, to be at all times kept open, at the lower end of said canal, in such manner as to prevent the possibility of stagnation in the waters thereof: *And Provided, also*, That the canal shall be thoroughly cleaned out between the 1st of November and the 1st of May of each year, by the grantee, F. W. Green: *Provided, also*, That any owner of any lands or lot situated on said canal, below the point fixed in the first part of this section, may at any time extend the said canal further to any point within his, her, or their land or lots, which may be on the line of the said canal, upon paying to the said Frederick William Green, or his assigns, such part of the cost of putting said canal in repair, as may be in a fair proportion with the said William Frederick Green, to the advantages he, she, or they may gain by such extension; in which advantages

shall not be included any privilege to which he, she, or they may be entitled under any contract with the State or the Superintendent of Public Works.

II. That the State may at any time within said term of twenty-one years, resume its control over said canal, and defeat the lease hereby granted: *Provided,* That all the moneys laid out by the said Frederick William Green, or such others as may avail themselves of the provisions of the proviso to the first section of this Act, shall be repaid to him or them respectively; upon condition, however, that he or they, respectively, shall keep a true account of the same, and give a copy thereof to the Superintendent of Public Works, for each House of the Legislature, with the vouchers to sustain the same, to be reported by him at the next session thereafter for their approval or disapproval; and that there be annexed to the said accounts also the certified opinion of the said superintendent, that the said moneys so paid, were expended in good faith for such repairs as will be for the public interest, in case said canal shall at any future time be resumed by the State, and that the prices paid and charged were reasonable and fair: *And, provided, also,* That no other person shall use or enjoy any of the privileges of said canal without paying a fair proportion of the expense, as provided above. And if the said Frederick William Green, or his assigns, shall at any time abandon said canal, or the use of it, for a period of one year or suffer the water therein to become stagnant for any length of time whatever, then the rights and benefits hereby conferred upon the said Frederick William Green, his heirs and assigns, shall revert to the State.

III. That the said Frederick William Green shall have exclusive use of the wharves connected with said canal, for the landing of goods, merchandise and produce, during the period for which he shall hold said canal, under the lease hereby granted: *Provided,* That those who may extend the same under the proviso in the 1st section, shall have the use of such wharves as may be on their lands, in the same manner as is granted to said F. W. Green.

IV. That it shall be the duty of the Superintendent of Public Works to take care that all the terms and conditions imposed upon the lessee by this Act, be duly complied with and fulfilled, and report to the General Assembly all deviations therefrom.

V. That the several persons who owned lands or lots on the line of said canal, and who ceded or conveyed the right of way for the same to the State, with a view to its construction and use, and their assigns respectively, whose property, by reason of discontinuance of the use of said canal, is thereby left open to intrusion, shall be, and they are hereby, respectively authorized and empowered to fence in the parts of said canal, tow-paths and lands belonging to it, to take possession and keep the lock house, and to use the same until the State shall otherwise direct: *Provided,* The State may, at any time, and for any purpose, resume the same or otherwise dispose of them as it may see fit.

VI. That any person interested therein may cause to be erected across the said canal a bridge leading to the present landing place for cotton at the river, in a line with the upper boundary street of columbia: *Provided,* That the bridge so to be erected, shall be of the same height above the canal as the bridge which now crosses the canal, just opposite the Columbia bridge.

In the Senate House, the 19th day of December, in the year of our Lord one thousand eight hundred and forty-three and in the sixty-eighth year of the Sovereignty and Independence of the United States of America.

ANGUS PATTERSON,
President of the Senate.
W. F. COLCOCK,
Speaker of the House of Representatives.

Act of 1865.

An Act to Authorize the Sale of the Columbia Canal (13 *Stat.*, 293).

I. *Be it enacted by the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same,* That His Excellency the Governor, the Lieutenant Governor, and the Mayor of the city of Columbia, are hereby constituted a Commission to sell and convey the right, title and interest of the State in the Columbia Canal and in all lands, privileges and appurtenances owned by the State, thereunto belonging or appertaining, subject to the following conditions (in addition to such other conditions as the said Commissioners, in their discretion, may impose, which conditions shall be published in the advertisement), to wit: That the purchaser or purchasers, his or their heirs, assigns or successors, shall, within two years from the date of conveyance, complete the widening and deepening of said canal to at least twice its original capacity; that the same shall always be kept open and in proper order for boating purposes (free of charges for toll or otherwise) as far as the same is now used; that the water of said canal shall not be allowed to become stagnant; that the same shall not be used for other than hydraulic purposes, and that the title to the canal shall revert to the State on default being made in any of the conditions so imposed.

II. That for the purpose of enabling the purchaser to widen said canal, he be authorized to use the land for a space of sixty feet on either side of the center line of the present canal, on payment to the owner thereof such sums as may be assessed by Commissioners for that purpose, to be appointed by the Court of Common Pleas for Richland District; the proceeding of the Commissioners so appointed to be governed in all respect according to the provisions of the tenth

section of an act entitled "An act to authorize the formation of the Greenville and Columbia Railroad Company," ratified the fifteenth day of December, one thousand eight hundred and forty-five.

III. That for the purpose of securing to the State the highest price for the property proposed to be sold, and to enable all to compete for the purchase thereof, the said Commission shall cause the same to be advertised in at least one paper in New York, Richmond and Charleston, for two months previous to closing the contract. The said advertisement shall set forth fully the nature, value, importance and extent of the property to be sold, and invite bids for the same; the cost of such advertisement to be paid by check of His Excellency the Governor on the Treasurer, which check shall be paid by said Treasurer out of the public funds. And the said Commission shall accept the bid which, in their judgment, shall be most advantageous to the State.

In the Senate House, the twenty-first day of December, in the year of our Lord one thousand eight hundred and sixty-five.

W. D. PORTER,
President of the Senate.
C. H. SIMONTON,
Speaker of the House of Representatives.

Approved:
JAMES L. ORR.

Act of 1866.

An Act to Provide for the Establishment of a Penitentiary (13 *Stat.*, 366[28]).

* * * * * * *

II. That a Commission, consisting of three persons, to be styled Commissioners of the Penitentiary, shall be appointed by His Excellency the Governor, whose duty it shall be to

select and procure a proper site, at some point, if practicable, where water power may be available for manufacturing purposes, within the enclosure, on which to erect suitable penitentiary buildings, with sufficient space to enlarge and improve the same from time to time, as may be necessary.

* * * * * * *

In the Senate House, the twenty-first day of September, in the year of our Lord one thousand eight hundred and sixty-six.

W. D. PORTER,
President of the Senate.
C. H. SIMONTON,
Speaker of the House of Representatives.

Approved:
JAMES L. ORR.

Act of 1866.

An Act to Amend an Act Entitled "An Act to Authorize the Sale of the Columbia Canal," Ratified the Twenty-first Day of December, Eighteen Hundred and Sixty-five (13 *Stat.*, 378.)

I. *Be it enacted by the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same,* That the second Section of an Act entitled "An Act to authorize the sale of the Columbia Canal" be amended so as to read as follows: That the purchaser of said canal shall have authority to take possession of one hundred and fifty feet of land on either side of the center line of the present canal, on payment to the owner of the value of the same, and if the said purchaser and the owner cannot agree upon the value, then upon the payment of such sum as may be assessed by Commissioners, to be appointed for

that purpose by the Court of Common Pleas for Richland District, the proceedings of the Commissioners so appointed to be governed in all respects according to the provisions of the tenth Section of an Act to authorize the formation of the Greenville and Columbia Railroad Company, ratified the fifteenth day of December, in the year of our Lord one thousand eight hundred and forty-five; and upon payment of the sum thus agreed on or assessed, the purchaser shall be entitled in his own right to such land in fee simple. And the Commissioners hereby appointed for the sale of the canal are authorized to convey to the purchaser such portions of the public streets above Gervais street as lie within the limits of the said one hundred and fifty feet on either side of the center line of the canal.

II. That the third section be amended to read as follows: That the Commissioners already appointed be authorized to sell at public or private sale, at their discretion: *Provided*, That in any sale that may be made by said Commissioners, there be a reservation to the State of water power sufficient for the purposes of the State Penitentiary for all time, free of charge.

In the Senate House, the nineteenth day of December in the year of our Lord one thousand eight hundred and sixty-six.

W. D. PORTER,
President of the Senate.
C. H. SIMONTON,
Speaker House of Representatives.

Approved December 19, 1866.
JAMES L. ORR,
Governor.

Act of 1878.

An Act to Declare the Title of the State in the Columbia Canal and its Appurtenances (16 *Stat.*, 360).

WHEREAS default has been made in the conditions imposed in the deed of conveyance of the right, title and interest of the State in the Columbia Canal and in all the lands, privileges and appurtenances owned by the State thereunto belonging or appertaining, executed to Samuel Pearce, Jr., as Trustee for William Sprague, by the Commission appointed to sell and convey the same, bearing date September twenty-first, A. D. 1868, notwithstanding the privilege allowed and the extension of time afforded by the Acts of the General Assembly subsequent to the Act entitled "An Act to authorize the sale of the Columbia Canal," passed September 21, 1868 and approved by the Governor:

Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same; that the title to the premises conveyed by the said deed of conveyance has reverted to the State.

Approved February 14, 1878.

Act of 1878.

An Act to Authorize and Empower the Appointment of a Commission to Control and Direct the Development and Disposal of the Property of the State Known as the Columbia Canal and its Appurtenances (16 *Stat.*, 444).

SEC. 1. *Be it enacted* by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly and by the authority of the same; that the Attorney General, Comptroller General, and Secretary

of State and four citizens of the State to be appointed by the Governor are hereby constituted and appointed a Commission to take such steps as may be lawful to obtain possession of the property of the State known as the Columbia Canal, with its appurtenances and to control and direct the development and the disposal of the same.

SEC. 2. Said Commission shall have authority to grant, sell or lease sites of this property to parties desiring to erect factories, on such terms as may be decided on by said Commission: *Provided*, that in all cases they shall take bond with other good and sufficient securities from grantees or other contracting parties for the fulfillment of their contracts, and shall make, annually, a report of all their actings and doings to the Legislature.

SEC. 3. That for the purpose of developing the power, the Commission is authorized to employ convicts from the penitentiary, and for that purpose may call on the Superintendent for 200 convicts.

SEC. 4. That said grants, or leases or sales shall only be made for manufacturing purposes, and shall revert to the State when not used for that purpose, and in all grants that may be made, sufficient power shall be reserved to the State for the use of the penitentiary and the City of Columbia.

SEC. 5. That the Commission shall receive no pay, and shall continue in office until their successors are appointed.

Approved March 12th, 1878.

Act of 1879.

"*An Act to Authorize the Canal Commission Appointed Under and by Virtue of an Act Entitled 'An Act to Authorize and Empower the Appointment of a Commission to Control and Direct the Development and Disposal of the Property of the State Known as the Columbia Canal and Its Appurtenances,' Approved March 12, 1878, to Enter Into a Contract and Covenant for and on Behalf of the State, with David M. Thompson and Augustus F. Neagle, Their Heirs and Assigns, to Dispose of Said Columbia Canal, with a View to Its Development, Upon Such Terms and Conditions as Are Expressed in This Act.*" (*17 Stat. S. C., 87.*)

SECTION 1. *Be it enacted* by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the said Canal Commission shall, and they are hereby, authorized to enter into a covenant and agreement on the part and behalf of the State with David M. Thompson and Augustus F. Neagle, their heirs and assigns, to sell and dispose of the property of the State known as the Columbia Canal, with a view to the development thereof, together with the lands held therewith, and all and singular the rights, members and appurtenances thereunto belonging, except the land long the canal between the head of Congaree River and the south side of Gervais street, between which points all necessary rights of way for widening and deepening canal, with all roadways necessary on both sides of said canal, shall be granted, and under said contract the right is hereby conferred upon the said parties, their heirs and assigns, to construct a dam across the Congaree River at or above the site of the penitentiary on said river, and across the Broad River, at or below the head of the present canal, either or

oth, as by future surveys may be deemed the best location
or said dam or dams and the better development of said
ater power: *Provided, always,* That where said canal shall
oss any highway or street from said dam on Congaree River
own to and including Gervais street, said parties shall in no
ay be required to contribute to the building of any bridges
hich may be thereby rendered necessary: *Provided,* They
ake a suitable passway for migratory fish.

SEC. 2. That the said David M. Thompson and Augustus
Neagle, their heirs and assigns, shall have the same right,
d the same powers, privileges, and franchises are hereby
nferred upon them, their heirs and assigns, to open a canal
on the Lexington shore of the Congaree River, and to
ild such banks, bulkheads, buildings, or other structures as
ay be necessary and convenient to the full development of
e water power of the Congaree and Broad rivers at the city
Columbia.

EC. 3. That in locating the dam on the Congaree River,
said parties, their heirs and assigns, shall have the right
aise the waters of the said Congaree River to such a height
he said dam as will give a head and fall of twenty-two feet
ve the mean low water at the south side of Gervais street;
he dam be located on Broad River, then they shall have
right to raise the waters on the Broad River of such a
ght as will give a head and fall of thirty-four feet at the
h side of Gervais street at mean low water, with the right
uild all necessary banks, abutments, or other structures on
sides of the said rivers as may be required to complete
said dam or dams across the said rivers or either of them;
the right is hereby granted to widen and deepen the said
l and change the course thereof in such manner as the
parties may consider necessary for the better develop-
t of the said water power.

EC. 4. That the said parties, their heirs and assigns, shall
the right of way, and the same is hereby granted, in

and along the said canal, for the construction and operation of the same from the head of the Congaree River to Gervais street, on the Columbia side of said river, and at all points below Gervais street on Lexington shore, and on Broad River to the head of the old canal; where any property lying along the said canal or canals shall be held as the private property of any person or persons, the said parties, their heirs and assigns, for the sake of the public improvement contemplated in the construction of the said canal or canals, and the better navigation of the said Congaree and Broad rivers, and the transportation of supplies to market, shall have the right to acquire such rights of way by condemnation and assessment for the uses aforesaid in the same manner as rights of way by law may be now acquired by railroads.

SEC. 5. That in consideration of the public improvement and general benefit aforesaid, and the use by the State of fifteen hundred horse power of water power between the City Water Works and Senate Street, to be used as hereinafter provided, the city of Columbia is hereby authorized to enter into an obligation to hold the said parties, their heirs and assigns, harmless as against all damages done from the acquisition of all rights of way between the head of the Congaree River and Gervais street, on the Columbia shore, and against the flowage of all low lands and back water above the dam so to be constructed across the Congaree.

SEC. 6. That, further, in consideration as aforesaid, the State hereby guarantees, and the said Canal Commission is hereby authorized in the name of the State to covenant with the said parties, their heirs and assigns, that for the space of three years, to commence within sixty days from the date of the said contract with the Canal Commission and the said parties, on the basis of two hundred and ninety-three and one-third working days, not more than ten hours each day, in each and every of said three years, the said parties shall have the use and employment of two hundred and fifty able-bodied male convicts, in lieu of the two hundred convicts

granted to the Canal Commission under the provisions of an act entitled "An act to authorize and empower the appointment of a commission to control and direct the development and disposal of the property of the State known as the Columbia Canal and its appurtenances," approved March 12, 1878, if there be that number of such convicts in the penitentiary, and, if not, as near that number as practicable, in and for the construction of the said canal or canals, and the all development of the said water power and all other work connected therewith and contemplated by this act; the said convicts to be clothed, guarded, and directed by the Board of Directors, and to be placed upon the work and returned to prison each day by the officers of the penitentiary, and the superintendent and directors of the penitentiary are hereby directed to always make provision for supplying the said number of convicts for the purposes above mentioned, and shall at all times be ready, after thirty days' notice, to furnish the said convicts upon the demand of the said parties.

SEC. 7. That it be, and is hereby, provided that the said parties, their heirs and assigns, may agree with the directors of the penitentiary for a greater or less number of convicts to be used at any time upon the work, but only by the free consent of both parties, and such increase or diminution shall be charged or credited so as to make the aggregate labor the same as hereinbefore provided, to be computed as aforesaid; and if at the expiration of the three years as above provided, the said parties, their heirs and assigns, shall have had the said labor of a greater number of convicts than is hereinbefore provided, then the said parties, their heirs and assigns, shall pay to the State such price per day for each day's work of every able-bodied convict employed in excess of the stipulated number, as may be agreed by the said parties and the Board of Directors of the penitentiary.

SEC. 8. That in the event of the partial or total destruc-

tion of any work or works which the said parties, their heirs and assigns, may have done, by fire, flood, or other providential and unavoidable cause, in such case the said parties, their heirs and assigns, shall be entitled to an extension of the time hereinbefore limited for the completion of the said work corresponding to the delay so caused by the partial or total destruction aforesaid.

SEC. 9. That the said parties, their heirs and assigns, in consideration of the rights and franchises herein granted, shall, within the period of three years from the date of said contract, complete the construction of the dam or dams and the bulkheads as hereinbefore provided, and shall complete the canal or canals from the said bulkheads down to the quarry situate upon what is known as the Kinsler tract, about seven-eighths of a mile below Gervais street, said canal on the Columbia shore to be so constructed as to develop 15,000 horsepower, and they shall have in operation within the time aforesaid one cotton mill of 16,000 spindles, and they shall give to the State, between the Columbia Water Works and Senate street, fifteen hundred horsepower of waterpower, to be used or disposed of in such manner and on such terms as the State may direct.

SEC. 10. That for the purpose of inducing capital to invest in mills upon the said canal or canals, the cotton mill hereinbefore provided for, and any other mill or mills, warehouses or other structures pertaining thereto, erected upon the said canal or canals, which shall be used and employed in the manufacture of cotton fabrics, yarns, or other material of any kind, shall be entitled, and are hereby declared to be entitled, to all the rights and privileges extended to individuals and associations of individuals to a rebate of taxes for ten years, in accordance with the provisions of an act entitled "An act to aid and encourage manufactures," approved December 20, 1873; and the said provisions are hereby made and shall be deemed part and parcel of this act.

SEC. 11. That the said parties shall be put into possession

under the agreement of sale herein authorized, and shall have the full enjoyment of the rights and franchises hereby conferred and granted to carry out the purposes of the said agreement of the sale authorized to be made under the provisions of this act, but the title to the said property shall remain in the State until the conditions herein expressed shall be performed by the said parties, their heirs or assigns, or a bond conditioned for the payment of $100,000, with good and sufficient sureties thereto, shall be given for the faithful performance of the conditions of their contract, which said bond shall be approved by the Attorney General, at which time (either as to the giving of the said bond or the performance of the said conditions) the State shall convey or cause to be conveyed the said property, with its appurtenances, in fee, to the said David M. Thompson and Augustus F. Nagle, their heirs and assigns forever: *Provided,* nevertheless, That if within the time in this act limited the conditions of the said contract be not performed as herein required, the said deed shall be void, and all the rights, title, interest, franchise, and estate conveyed thereby shall return to and rest in the State: *Provided,* further, however, That if the directors of the penitentiary shall fail to furnish the convicts, as required in section 6 of this act, the time within which the said conditions are to be performed shall be extended until such amount of labor has been furnished.

SEC. 12. That any contracts, liens, or encumbrances entered into with reference to said property, and the rights and franchises herein granted, shall be subject to the rights of, and the obligation to, this State, as hereinbefore set forth; and any transfer, alienation, or sale thereof, whether voluntary or enforced, shall not deprive the State of or interfere with such rights and obligations, subject, nevertheless, to the condition that the work is completed pursuant to the foregoing provisions in three years, and such additional time as is provided for herein.

SEC. 13. That the said Canal Commission, in executing in behalf of the State the convenant and agreement provided for in this act, may impose and require from the said parties such additional terms, guarantees, limitations, and restrictions as in their judgment may seem necessary and proper to protect the interests of the State in the labor of the convicts and in the penitentiary and canal property: *Provided*, That such additional terms shall not involve any additional liability on the part of the State nor any additional grant by the State of franchise, labor, or property.

SEC. 14. That the State hereby reserves the right to quarry rock from the quarry now open at the penitentiary for one year from the date of the said contract of sale and for such longer itme as the said David M. Thompson and the said Augustus F. Nagle, or their assigns, may not need the site of the said quarry for the construction of the canal, and thereafter the State reserves the right to quarry rock at any point on the lands conveyed by the State to the said parties that shall not endanger the said canal and other works necessary to the development of the said water power; and it is hereby further declared that in making the said contract of sale the said parties shall be required to covenant on their part that the State, or any person or persons under her permit, shall, free of charge, quarry stone for the Charleston jetties or public buildings of the State of Columbia upon the lands known as the Kinsler tract, now secured to the said David M. Thompson and Augustus F. Nagle, their heirs and assigns.

Approved December 23, 1879.

Act of 1882.

"An Act to Authorize the Canal Commission to Transfer and Deliver to the Board of Directors of the South Carolina Penitentiary the Property Known as the Columbia Canal, with the Lands Held Therewith and Its Appurtenances, and to Develop the Same." (*17 Stat. S. C., 855.*)

SECTION 1. *Be it enacted* by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly and by the authority of the same, That the Canal Commission, appointed by and under an act entitled "An act to authorize and empower the appointment of a commission to control and direct the development and disposal of the property of the State, known as the Columbia Canal, and its appurtenances," approved March 12, 1878, be, and they are hereby, authorized and directed to transfer and deliver to the Board of Directors of the South Carolina penitentiary the property known as the Columbia Canal, together with the lands held therewith, and all and singular the rights, members and appurtenances thereto belonging, which was acquired under and by virtue of the act above entitled, and the contract by them entered into with Sullivan Fenner, in pursuance of said act, on the 25th day of September, A. D. 1878: Provided, That nothing herein contained shall authorize any action by the Canal Commission until a release has been executed to the State of all the right, title, and interest in the property above described, of Messrs. Thompson and Nagle, or of any other parties holding any interest therein.

SEC. 2. That the said Board of Directors are hereby authorized and directed, on behalf of the State, to take into their possession the said property, with its appurtenances; and for the purpose of providing an adequate water power

for the use of the penitentiary, and for the other purposes to be hereinafter named, they are authorized, empowered, and directed to improve and develop the same.

SEC. 3. That in order to improve and develop the power of the said canal, they are authorized to construct a dam across the Broad River, at or below the head of the present canal, as by future surveys may be deemed most expedient for the better development of the said water power; and in locating and constructing the said dam, they shall have the right to raise the waters in the Broad River to such a height as will give a head and fall of thirty feet at the south side of Gervais street, at mean low water; with the right to build all necessary banks, abutments, and other structures, on both sides of said river, as may be required to complete the said dam; and the right is hereby given to widen and deepen the said canal throughout its length to the south side of Gervais Street, and to change the course thereof in such manner as they may consider necessary for the better development of the said water power: *Provided*, That the said canal shall be so enlarged as to develop at least ten thousand horse power of water power at the south side of Gervais Street: *Provided*, further, That suitable fishways for the free passage of fish be constructed in said dam.

SEC. 4. That the said Board of Directors shall have the right of way, and the same is hereby granted, in and along the said canal for the construction and operation of the same; and if, in enlarging and developing the said canal, or in constructing the said dam, it becomes necessary to use the private property of any person or corporation for that purpose, the said Board of Directors, for the sake of the public improvement contemplated in the construction of the said canal, and the better navigation of the said Broad and Congaree rivers, and the transportation of supplies to market, shall have the right to acquire such right of way in manner now provided by law.

SEC. 5. That in the construction of the said dam, and the enlargement of the said canal, and in the performance of all other work necessary to the full development of the said water power, the said Board of Directors are authorized to use and employ the labor of the Penitentiary convicts, using for that purpose so many as in their judgment may be necessary; and the said Board of Directors are further authorized to expend in the employment of skilled labor and engineers, and for the purchase of machinery and materials, such an amount of the income of the penitentiary, over and above amounts necessary for the support and maintenance of said institution as may, in their judgment, be necessary for the proper execution of said work, not to exceed the sum of ten thousand dollars in any one year.

SEC. 6. That the said Board of Directors are authorized to furnish to the city of Columbia, for the purpose of operating its waterworks and other purposes, five hundred horse power of water power; and to Sullivan Fenner under his contract with the Canal Commission, five hundred horse power of water power; and after reserving for the use of the penitentiary a power sufficient to meet the demands of its ordinary operations, and other industries conducted and carried on within its walls, they are further authorized, with the Comptroller General, on behalf of the State, to lease to other persons or corporations water power upon such terms, and at such annual rental, per horse power, as in their judgment may be proper; and also to lease such mill sites along the line of the said canal, as may be owned by the State, upon such terms as may be deemed most advantageous to the interest of the State.

SEC. 7. And the said Board of Directors, and the Comptroller General, on behalf of the State, shall hold, manage, and control the said canal property, with its appurtenances, in connection with the South Carolina penitentiary, and shall make annually, to the General Assembly, a report of their actings and doings under this act, giving a detailed statement of their receipts and expenditures.

SEC. 8. The said Board of Directors shall be paid the same per diem and mileage for their services under this act as they may be allowed by law for penitentiary service, to be paid out of the income of the penitentiary.

SEC. 9. All acts and parts of acts inconsistent with this act are hereby repealed.

In the Senate House, the eighth day of February, in the year of our Lord one thousand eight hundred and eighty-two.

Approved February 9th, A. D. 1882.

Act of 1887.

"An Act to Incorporate the Board of Trustees of the Columbia Canal, to Transfer to the said Board the Columbia Canal with the Lands Now Held Therewith, and its Appurtenances, and to Develop the Same." (19 *Stat. S. C.*, 1090.)

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the Board of Directors of the South Carolina Penitentiary are hereby authorized, empowered and required to transfer, assign and release to the Board of Trustees of the Columbia Canal, hereinafter created and provided for, the property known as the Columbia Canal, together with the lands now held therewith, acquired under the acts of the General Assembly of this State with reference thereto or otherwise, all and singular the rights, members and appurtenances thereto belonging; and upon such transfer, assignment and release all the right, title and interest of the State of South Carolina in and to the said Columbia Canal and the lands now held therewith, from its source at Bull's Sluice through its whole length to the point where it empties

into the Congaree River, together with all the appurtenances thereunto belonging, shall vest in the said Board of Trustees for the use and benefit of the city of Columbia, for the purposes hereinafter in this act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the said Board of Trustees and their assigns: *Provided,* That should the said canal not be completed to Gervais street within seven years from the passage of this act all the rights, powers and privileges guaranteed by this act shall cease, and the said property shall revert to the State.

SEC. 2. That the said Board of Trustees are hereby authorized and directed, for the development of the said canal, to take into their possession the said property with all its appurtenances; and for the purpose of navigation, for providing an adequate water power for the use of the penitentiary and for other purposes hereinafter named, they are hereby authorized, empowered and directed to improve and develop the same.

SEC. 3. That in order to improve and develop the power of the said canal for navigation, to furnish the city of Columbia with an adequate supply of water and other hydraulic purposes, they are authorized to construct a dam across Broad River at, above or below the head of the present canal, as, by survey already made or hereafter to be made, may be deemed advisable for the development of the said water power, and in locating and constructing the said dam, they shall have the right to raise the water in the Broad River to such a height as will give a head and fall of thirty-seven feet at the south side of Gervais street at mean low water; with the right to build all necessary banks, abutments and other structures on both sides of said river as may be required to complete the said dam, and the right is hereby given to widen and deepen the said canal throughout its length, from its source at Bull's Sluice to the Congaree River, at or near the mouth of Rocky Branch, on the general line of the canal,

with such deflections therefrom as to them may seem ex
pedient for the better development of the said water power
Provided, That the canal be so enlarged as to carry a body o
water 150 feet wide at the top of the water, 110 feet wide a
the bottom and ten feet deep, and shall develop at least 10,000
horse-power at the south side of Gervais street: *Provided
further*, that a suitable fishway for the free passage of fish be
constructed in the said dam.

SEC. 4. That the said Board of Trustees shall have the
right of way, and the same is hereby granted, in and along
said course of the canal, for the construction and operation
of the same; if in enlarging and developing the said canal
or in constructing the said dam, it becomes necessary to use
the private property of any person or corporation for that pur-
pose, the said Board of Trustees, for the sake of the public
improvement contemplated in the construction of the said
canal, and the better navigation of the said Broad River and
Congaree River, and the transportation of supplies to market,
shall have the right to acquire such right of way in the man-
ner now provided by law.

SEC. 5. That the said canal shall be opened for navigation
free of charges by the said Board of Trustees, the State re-
serving the right to make such improvements in the canal
as may be necessary to promote navigation through the canal
more rapidly than can be accomplished by the board under
this act: *Provided*, the said Board of Trustees or lessees of
the water power are indemnified against any damages arising
therefrom.

SEC. 6. That the said Board of Trustees are required to
build only one bridge over the canal, to wit, one on Gervais
street. That the said trustees or assigns shall not be required
to build any draws or passageways through any other bridges
across the canal, unless they voluntarily build additional
bridges and draws or passageways therein shall become neces-
sary for purposes of navigation, and if such draws and pas-
sageways or bridges other than those above provided for

should be built they shall not be required to work the same except for their own benefit, nor shall they be required to attend on any locks which may be built.

SEC. 7. That the Board of Trustees shall, within two years from the ratification of this Act, complete the said canal so as to carry a body of water 150 feet wide at the top, 110 feet wide at the bottom and ten feet deep, from the source of the canal down to Gervais street, and to furnish to the State, free of charge, on the line of the canal, 500 horse-power of water power, to Sullivan Fenner as assigns 500 horse-power of water power, under his contract with the Canal Commission, and to furnish the city of Columbia 500 horse-power of water power at any point between the source of the canal and Gervais street the city may select, and shall, as soon as is practicable, complete the canal down to Congaree River a few yards above the mouth of Rocky Branch: *Provided*, That the right of the State to the free use of the said 500 horse-power shall be absolute, and any mortgage, assignment, or other transfer of the said canal by the said Board of Trustees or their assigns shall always be subject to this right.

SEC. 8. That in order to secure and aid the speedy completion of the canal, from its source to Gervais street, for furnishing the said water power to the State and to the city of Columbia, the Board of Directors of the South Carolina Penitentiary shall furnish to the order of the said Board of Trustees such convicts as may from time to time be in the penitentiary unemployed and not under contract and are now allowed by law to be employed or worked outside of the walls of the penitentiary: *Provided*, That the convicts who shall be employed on the canal may at any time be leased by the Board of Directors and forthwith withdrawn from the work on the canal; that the employment of such convicts shall not interfere with the right of the Board of Directors in leasing and hiring convicts as is now or may hereafter be provided by law: *Provided, further*, That the said convicts shall be worked under the supervision of the superin-

tendent of the penitentiary and work according to the plans adopted by the trustees.

SEC. 9. That to secure the speedy development of the said canal, the Board of Trustees shall have power to borrow money by issuing bonds to the amount of $200,000, bearing interest from date at the rate of six per cent per annum, to negotiate the same, and to use the proceeds for the construction of the said canal.

SEC. 10. That the said Board of Trustees shall have the power to mortgage the canal, with the land held therewith and all its appurtenances, to secure the payment of the principal and interest of the said bonds.

SEC. 11. That $100,000 of the said bonds shall be made payable the first day of January, A. D. 1918, and the remaining $100,000 of the said bonds shall be made payable on the first day of January, A. D. 1919. That one moiety or half of each class of bonds shall be of the denomination of $1,000 and one-half of the denomination of $500. Each shall have coupons attached, and shall bear interest at the rate of six per cent per annum. The first coupons on the bonds maturing January the first, 1918, to be payable July the first, 1888; the subsequent coupons shall be payable on the first day of January and July of each and every year until the maturity of the said bonds; that the first coupons of the bonds maturing the first day of January, 1919, shall be made payable on the first day of July, 1889; the subsequent coupons shall be payable on the first day of January and July of each and every year until the maturity of these last-mentioned bonds, to wit, January 1, 1919. Each and all of the said bonds shall be signed by the Chairman of the Board of Trustees and countersigned by the secretary and treasurer of the said Board. Each and every coupon shall have the facsimile of the written signature of the chairman and the secretary and treasurer imprinted thereon. On the back of each and every bond shall be printed the following words: "The city of Columbia, South Carolina,

uarantees the prompt payment of each and every coupon ttached to this bond," which shall be signed by the mayor the city of Columbia and countersigned by the city clerk nd treasurer and attested by the corporate seal of the said ty, and the said bonds shall not be negotiable without this uarantee is signed by the said mayor and city clerk and easurer.

SEC. 12. That the said Board of Trustees shall keep a gistry of the bonds, signed, showing the number and nount of each bond and coupons attached. That when e bonds are signed by the mayor and the city clerk and easurer of the city of Columbia, they shall immediately ereafter be turned over to the said Board of Trustees of the lumbia Canal. That the said Board of Trustees shall ve power to negotiate the sale of the bonds payable Janu- y 1, 1918, forthwith, and the funds arising therefrom all be used for the development of the said canal. That er the first day of January, 1889, the said Board of ustees shall have the power to issue and sell the remain- g $100,000 of bonds authorized to be issued under this t, and devote the proceeds to the development of the said nal: *Provided,* The said board shall not sell any bond less than 90 per cent of its face value.

SEC. 13. That the said Board of Trustees of the Columbia nal shall cause an accurate abstract of the contents of s Act to be printed on the back of each of the said bonds d on the face of each bond it shall be expressed that the ne is issued under the authority of this Act.

SEC. 14. That the said Board of Trustees shall keep a rect registry of each bond sold, the number and amount the bond, the party to whom sold and the amount re- ved, and shall annually report to the city council a true tract therefrom.

SEC. 15. That if any member of the said Board of Trus- s shall fraudulently issue any of the said bonds, or fraud- ntly dispose of any money arising from the sale thereof,

he shall be guilty of a misdemeanor, and upon conviction shall be punished by fine and imprisonment at the discretion of the court.

SEC. 16. That the said Board of Trustees may, at discretion, purchase or lease any land adjoining the Columbia Canal which they may think beneficial to the successful development of the canal, and may sell or lease any land on the canal, to be used for manufactories or to facilitate the navigation of the canal. That they may also during the years 1888 and 1889, at their discretion, contract to furnish water power at three dollars or less a horse-power per year, for ten years, to any party who will put up a factory of 10,000 spindles, or any factory which they may think of equal importance for the development of the canal. That after the year 1889 no water power shall be sold for less than five dollars a horse-power per annum.

SEC. 17. That the land, the canal and the appurtenances thereof, transferred to the said Board of Trustees of the Columbia Canal, and the bonds issued by them, shall be exempt from taxation, except for State purposes; that the buildings hereafter erected and the lands hereafter acquired shall be taxable, unless they are exempted under the general tax law of the State.

SEC. 18. That the said Board of Trustees shall, after the year 1893, pay the interest on the said bonds each and every year, if practicable for them to do so; and as soon thereafter as they shall be able, from the proceeds of the rental of water power of the canal, they shall create a sinking fund, in bonds issued by the said Board, which shall immediately be cancelled, or to be invested in bonds of the State of South Carolina; *Provided,* They can be purchased at a premium of 7 per cent or less; and as soon as practicable the Board of Trustees shall pay all the bonds issued by the said board, and then transfer the Columbia Canal and its appurtenances to the city of Columbia: *Provided, further,* That the city of Columbia may at any time, with the consent of the bond-

holders and other creditors of the said board, take possession of the Columbia Canal, with all its appurtenances, upon assuming all the liabilities of the said board and indemnifying its members from loss.

SEC. 19. To insure the prompt development of the said canal, and to enable the Board of Trustees to offer inducements for the speedy erection of factories on the canal below Gervais street, the said trustees are authorized and required, before they shall employ any of the proceeds of said bonds in developing the canal below Gervais street, to secure, by contract or purchase, and control, land on the canal south of Gervais street, with frontage sufficient for at least two mill sites suitable for the erection of factories of 20,000 spindles each.

SEC. 20. That the said Board of Trustees of the Columbia Canal shall consist of five members. The mayor shall be a member ex officio; the mayor and aldermen of the city of Columbia shall elect the other four, one from the city council, the other three from the citizens of Columbia at large. The mayor and the alderman elected shall hold their membership during the time they are members of the city council; the other three shall hold their office for four years. The members of the Board of Trustees shall be elected by the mayor and aldermen of the city of Columbia at the meeting of the city council which is held to declare the result of the vote of the legal voters of the city of Columbia authorizing the mayor and aldermen to guarantee the payment of the interest on the bonds to be issued by the said Board of Trustees or as soon thereafter as practicable.

SEC. 21. The said Board of Trustees shall be, and is hereby, declared a body politic and corporate. Its corporate name shall be "Board of Trustees of the Columbia Canal." Its officers shall be a chairman and a secretary and treasurer. It shall have a corporate seal; may make and enforce its by-laws for its government; may purchase, sell or lease lands adjoining the canal useful for the purposes of the canal;

may sell or lease the water power of the canal, subject to such rules and regulations as it shall prescribe, having first provided for the State with 500 horse-power of water power at the penitentiary and 500 horse power of water power for Sullivan Fenner or his assigns, and 500 horse power of water power for the city of Columbia; may sue and be sued, plead or be impleaded, under their corporate name, and exercise such other powers as are hereinbefore granted, and shall fix such compensation for the services of the secretary and treasurer as they may deem proper.

SEC. 22. That all vacancies caused in the Board of Trustees by death or from other causes shall be supplied by election by said board, except in the case of the mayor and the aldermen elected by the City Council, who hold their places by virtue of their office.

SEC. 23. The said Board of Trustees, as soon as they have fully developed the said canal, and secured the payment of the debts contracted by them in its development, they shall turn over the canal with all its appurtenances to the city of Columbia.

SEC. 24. That this act shall be of force for thirty-one years and shall go into effect immediately upon its passage.

In the Senate House, the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

Second Act of 1887.

"An Act to Authorize the City of Columbia to Guarantee and Pay the Coupons on Bonds to be Issued by the 'Board of Trustees of the Columbia Canal,' under an Act Entitled 'An Act to Incorporate the Board of Trustees of the Columbia Canal to Transfer to the Said Board the Canal, with the Land Now Held Therewith and Its Appurtenances, and to Develop the Same.'" (19 *Stat. S. C.*, 1097.)

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That inasmuch as the completion of the Columbia Canal will secure to the city of Columbia the navigation of the Congaree and Broad rivers, give it greater facilities to increase her water supply, to establish electric lights, and for other municipal purposes, the Mayor and Aldermen of said city, upon the passage of an act entitled "An Act to incorporate the Board of Trustees of the Columbia Canal, to transfer to the said board the canal, with the land now held therewith and its appurtenances, and to develop the same," shall order an election for the legal voters of the city of Columbia, to be held within two weeks after the approval of the said act, or as soon thereafter as practicable, to determine whether or not the city of Columbia shall guarantee and pay the coupons on the bonds to be issued by the Board of Trustees of the Columbia Canal as they mature.

SEC. 2. That the said election shall be held in the different wards of the city under the direction of the Mayor and Aldermen. Each vote deposited by legal voters of the city shall have written or printed thereon "Guarantee" or "No Guarantee."

SEC. 3. That the managers of the polls in each ward shall report to the City Council the number of legal votes cast for

"Guarantee" and for "No Guarantee," and the majority of the votes cast will determine the question, and the Mayor and Aldermen shall declare the election: *Provided, however,* That it shall require a majority of all the qualified electors residing within the corporate limits of the said city of Columbia.

SEC. 4. That if the Mayor and Aldermen shall publish the election that a majority of the votes of the legal voters of Columbia which were cast at the election ordered by them was in favor of "Guarantee," then, at the same meeting of the City Council, which publishes the election, or as soon thereafter as it is practicable, the Mayor and Aldermen shall be authorized and required to levy such a tax on the real and personal property assessed for taxation in the city of Columbia as may be necessary to pay the coupons, to be guaranteed by the city, maturing on the bonds to be issued by the "Board of Trustees of the Columbia Canal," for the year A. D. 1888, and shall annually thereafter levy a tax sufficient to pay the coupons as they mature on said bonds, and shall pay the same: *Provided,* That after the year 189[illegible] the Board of Trustees of the Columbia Canal shall pay over semiannually to the city of Columbia all the net increase derived from the sale, leasing or renting of water power, or such other sources, not exceeding in any one year the amount of the coupons maturing: *Provided, further,* That the amount of such levy, when added to the levy for the current expenses of the city and for the interest on the bonded debt of the city, shall not exceed two per cent on the assessed value of the property in the city in any one year.

SEC. 5. That as soon after the publishing of the election of the legal voters that the majority of the votes were cast for "Guarantee," as is practicable, the Mayor and Aldermen shall elect four members of the Trustees of the Columbia Canal, one from the Aldermen and three from the citizens at large.

SEC. 6. That the said Mayor and the city clerk and treasurer shall, as soon as practicable thereafter, sign the guarantee on the back of each bond of the following words: "The city of Columbia, South Carolina, guarantees the prompt payment of each and every coupon attached to this bond," which may be presented to them for signatures by the said "Board of Trustees of the Columbia Canal," and shall attest their signatures by the corporate seal of the city of Columbia, and as soon as signed and sealed to return the same to the said Board of Trustees of the Columbia Canal.

SEC. 7. That the Mayor and Aldermen shall keep a registry of all bonds which the Mayor and city clerk and treasurer have signed as guaranteeing the coupons, giving the number and denominations of bonds, and the number and amount of the coupons; that the said coupons as they mature shall be payable at the office of the city clerk and treasurer, in the city of Columbia, and shall be receivable for taxes due the city, except for water rents.

SEC. 8. That this act shall be of force for thirty-one years and shall go into effect immediately upon its passage.

In the Senate House the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

Act of 1890.

"*An Act to Amend an Act Entitled 'An Act to Incorporate the Board of Trustees of the Columbia Canal, to Transfer to the said Board the Columbia Canal, with the Lands Now Held Therewith and its Appurtenances, and to Develop the Same,' Approved December* 24, 1887." (20 *Stat. S. C.*, 967.)

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the

same; that section 3 of an act entitled "An act to incorporate the Board of Trustees of the Columbia Canal, to transfer to the said Board the Columbia Canal, with the lands now held therewith and its appurtenances, and to develop the same," approved December 24, 1887, be, and is hereby, amended so as to read as follows:

SEC. 3. That in order to improve and develop the power of said canal for navigation, to furnish the city of Columbia with an adequate supply of water and other hydraulic purposes, they are authorized to construct a dam across Broad River at, above or below the head of the present canal, as by survey already made or hereafter to be made may be deemed advisable for the development of the said water power, and in locating and constructing the said dam they shall have the right to raise the water in Broad River to such a height as will give a head and fall of thirty-seven feet at the south side of Gervais street at mean low water; with the right to build all necessary banks, abutments, and other structures on both sides of said river as may be required to complete the said canal; and the right is hereby given to widen and deepen the said canal throughout its length from its source at Bull's Sluice to the Congaree River, at or near the mouth of Rocky Branch, on the general line of the canal, with such deflections therefrom as to them may seem expedient for the better development of the said water power: *Provided*, That the canal be so enlarged as to carry a body of water one hundred and fifty feet wide at the top of the water, one hundred and ten feet wide at the bottom, and ten feet deep, and shall develop at least ten thousand horse power at the south side of Gervais street: *Provided further*, That for a distance of about fifty-three chains southerly from the south line of Gervais street the minimum dimensions of said canal shall be one hundred and fifty feet width at normal level of the surface of the water in the canal when completed, one hundred and ten feet width at the bottom and ten feet depth; thence southerly for fourteen chains the canal shall be uniformly de-

minished so as to have the minimum dimensions at the southerly end of said fourteen chains of one hundred and twenty feet width at normal level of the surface of the water in the canal when completed, eighty feet width at the bottom and ten feet depth, and these latter minimum dimensions shall continue to the terminus of the canal, a distance of about sixty-seven chains: *Provided, further,* That suitable fishways for the free passage of fish be constructed in the said dam.

SEC. 2. That section 23 of said act be, and the same is hereby, amended so as to read as follows:

SEC. 23. That the said Board of Trustees, as soon as they have fully developed the canal and secured the payment of the debts contracted by them in its development, *they* shall turn over the canal, with all its appurtenances, to the city of Columbia. But the said Board of Trustees shall have full power and authority, before the said canal has been fully developed and completed and turned over to the city of Columbia, to sell, alienate and transfer the same and all its appurtenances, the lands held therewith, and all the rights and franchises conferred by this act on said Board of Trustees, to any person or corporation, subject, however, to all the duties and liabilities imposed thereby, and subject to all contracts, liabilities and obligations made and entered into by said Board prior to such sale and transfer, upon the approval and consent of nine members of the City Council of the city of Columbia, and before such sale, alienation and transfer is made, thirty days' notice of the offer to purchase and the terms thereof shall be given to the council of the city of Columbia.

Approved December 24, A. D. 1890.

Act of 1892.

An Act to Ratify and Confirm the Contract Made and Entered into by and Between the Board of Directors of the South Carolina Penitentiary and the Columbia Electric Street Railway, Light and Power Company, for the Development of the Five Hundred Horse Power of Water Power Reserved by the State of South Carolina for the Use of the South Carolina Penitentiary, Along the Line of the Columbia Canal. (21 *Stat., S. C.*, 94.)

Whereas, at a regular meeting of the Board of Directors of the South Carolina Penitentiary, held in the city of Columbia on the 17th day of May, A. D. 1892, a resolution was unanimously adopted authorizing and instructing the Superintendent of the South Carolina Penitentiary, on behalf of the said Board, to enter into a contract with the Columbia Electric Street Railway, Light and Power Company for the development and utilization of the five hundred horse power of water power reserved by the State of South Carolina for the use of the South Carolina Penitentiary, along the line of the Columbia Canal; and, whereas, the Superintendent of the South Carolina Penitentiary, pursuant to the said resolution of the said Board, did, on the 26th day of May, A. D. 1892, execute a contract with the said the Columbia Electric Street Railway, Light and Power Company, for the development and utilization of the said water power upon certain terms expressed in the said contract; and, whereas, the said the Columbia Electric Street Railway, Light and Power Company, pursuant to the said contract, has erected extensive mason work, and has placed thereon water wheels for the development of the said five hundred horse power of water power, and erected thereon all necessary buildings, shafting, etc., with all necessary water wheels, gateways, and other structure for the complete devel-

opment and use of the said water power, and has in all other respects fully complied with the terms of the said contract; Now, therefore,

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the said contract by and between the Board of Directors of the South Carolina Penitentiary, and the Columbia Electric Street Railway, Light and Power Company, for the development of the said water power, be, and the same is hereby, ratified and confirmed, subject, however, to all of the conditions, limitations and restrictions in the said contract provided.

Approved December 24th, A. D. 1892.

Act of 1912.

"An Act to Authorize and Empower Columbia Railway, Gas and Electric Company to Construct and Maintain a Dam In and Across the Congaree River and Columbia Canal at or Near the Confluence of the Broad and Saluda Rivers, for the Purposes Therein Mentioned." (27 *Stat. S. C.*, 779.)

SECTION 1. Be it enacted by the General Assembly of the State of South Carolina, That Columbia Railway, Gas and Electric Company be, and it is hereby, authorized and empowered to construct and maintain a dam of stone or such other material as said company may deem proper, for the purpose of developing, transmitting and selling electrical power for the use of public and municipal service, and for industrial and private concerns in the city of Columbia and State of South Carolina, in and across the Congaree River and the Columbia Canal, at or near the confluence of the Broad and Saluda Rivers, and about seventeen hundred feet north of the waterworks plant of the city of Columbia, the

height of which shall be not more than forty-five feet above the present level of the river bed, and which shall raise the water in said canal and river to a height of ten feet above the present level of the water in said canal, together with the right to build and construct all necessary banks, abutments and other structures, on both sides of said river and canal, as may be required to complete the same, and for its use for the purposes herein mentioned, and may enlarge and raise the present embankments of the canal to such height as may be necessary and sufficient to protect the said city waterworks plant and the other property along the line of the canal against overflow or damage by reason of the construction and maintenance of said dam across said river and canal. The said company shall have the right, power, and privilege to acquire, by purchase or by condemnation proceedings, all lands which may be overflowed or damaged by the construction and maintenance of such dam as shall be constructed and maintained under the power and authority conferred by this Act: *Provided,* That this Act shall be without prejudice to the rights of any person or corporation aggrieved or damaged by the construction and maintenance of the said dam: *Provided,* That all the rights, powers, and privileges herein granted shall cease and be null and void unless the construction of said dam authorized herein be completed within five years from the date of the passage of this Act unless prevented by Providential cause: *Provided, further,* That in the construction and maintenance of such dam suitable fishways shall be made and maintained, and every forebay or tailrace shall be protected by some suitable device to prevent fish going into the water wheels.

SEC. 2. That in the construction of the said dam the said Columbia Railway, Gas and Electric Company shall cause to be constructed near the gateways on the canal in said dam a lock of the dimensions of not less than twenty-two feet in width, 110 feet in length and six feet in depth for the purposes of navigation of said rivers and to be used for such purposes.

SEC. 3. That the power of condemnation of lands which may be necessary for use in the construction of said dam and its abutments, and of the necessary structures and buildings for the development of the power and its utilization hereinbefore stated, and of such lands as may be subject to be overflowed or damaged by reason of the backing of said water, shall be exercised in the same manner as now provided by the law of this State for the condemnation of lands for railway, canal and turnpike purposes: *Provided*, That the right of condemnation shall not be exercised until the said company shall have acquired by purchase seven-elevenths of all lands that may be overflowed by reason of construction and maintenance of said dam as shown by the maps and plans of the engineers of said company.

SEC. 4. That before the said Columbia Railway, Gas and Electric Company shall commence the construction of the dam across the Congaree River and the Columbia Canal, herein authorized to be constructed, it shall enter into an agreement with the said city of Columbia, through its City Council or other municipal power having control and jurisdiction thereof, upon satisfactory terms to the said city authority or authorities, for the protection and safe guarding of the water supply of the said city from the Congaree or Saluda rivers, and of the waterworks plant of said city, against any damage, pollution, injurious effect or other danger whatsoever which said city authorities may deem and consider would arise from the construction of the dam herein authorized, and the enlargement of the embankments of the canal for the development contemplated by the construction of said dam, and for the payment of all expenses incurred by the city in adjusting its water plant to the proper utilization of the water supply to which it is entitled made necessary by the construction of the new dam.

SEC. 5. That the exemption from taxation authorized by section 17 of the act entitled "An act to incorporate the Board of Trustees of the Columbia Canal, to transfer to the said

Board the Columbia Canal with the lands now held therewith, and its appurtenances, and to develop the same," approved December 24, 1887, shall have no application to the dam, buildings, works and structures herein authorized to be made by the Columbia Railway, Gas and Electric Company, and its undertaking to construct said dam and works aforesaid shall be deemed and taken to be an acceptance of the terms and conditions contained in this section, and all property which may be acquired other than that expressly exempted shall be subject to taxation, for all State, county and municipal purposes.

SEC. 6. That nothing contained in this act shall be taken or construed to relieve said company from any of the obligations and liabilities imposed by the provisions of an act to incorporate the Board of Trustees of the Columbia Canal, to transfer to the said board the Columbia Canal with the lands now held therewith, and its appurtenances, and to develop the same, approved December 24th, 1887, and all acts amendatory thereof: *Provided*, That if the said company shall accept the franchises, powers and privileges herein given, it shall be deemed and taken thereby to have contracted, covenanted and agreed with the State, that it and its successors and assigns will complete the Columbia Canal in accordance with the acts of the General Assembly heretofore passed referring to said completion, within such time as any court of competent jurisdiction shall, at suit to be brought by the Attorney General, decide to be reasonable or practicable within the meaning of said previous Acts, and if it shall fail to complete said canal within such time as shall be fixed and determined, that it will then pay to the State such sum in lieu of such compensation as may be determined to be reasonable in an action to be brought therefor by the Attorney General, and he is hereby authorized and directed to bring the action herein referred to, and the said company shall file with the Secretary of State, within one year after the passage of this Act, under the hand and seal of its president and secretary

and treasurer, its acceptance or rejection of the provisions of this Act, otherwise the powers herein granted shall cease and be utterly null and void. That said corporation shall have no power or authority to sell, merge, pool or in any other manner whatsoever dispose of the rights, privileges or franchise herein granted or conferred, without first obtaining permission from the General Assembly of the State of South Carolina, after furnishing full facts as to the proposed sale, merger, pool or other manner of proposed disposition. Anything in this Act inconsistent with the provisions of this section are hereby made expressly subject to the terms of this section: *Provided*, This shall not apply to any mortgage made to raise money to build said dam.

SEC. 7. That all Acts and parts of Acts inconsistent with the provisions hereof be, and the same are hereby, repealed.

Approved the 26th day of February, A. D. 1912.

Act of 1914.

"*An Act Requiring the City of Columbia to Continue to Maintain the Bridge Erected by Said City Across the Columbia Canal Until Construction Work Begins for the Completion of Said Canal*" (28 *Stat. S. C.*, 881).

SECTION 1. City of Columbia Required to Maintain Bridge Across Canal Until Work Begins for Completion of Canal.—*Be it enacted by the General Assembly of the State of South Carolina*, That the bridge heretofore erected by the city of Columbia over the Columbia Canal, and used by the citizens of Columbia as a passageway across said canal, and also used by the city of Columbia for the purpose of supporting certain water mains which carry the water supply of said city from the Broad River to the city water plant, may be maintained by the city of Columbia to and for the purpose of a passageway for the citizens of Columbia, and also for the purpose of

carrying the water pipes of said city, until such time as construction work for the completion of said canal be actually begun, or until this Act shall be repealed or modified.

Approved the 28th day of February, A. D. 1914.

Act of 1917.

"An Act to Declare That the Columbia Canal, and Its Appurtenances, and the Interest of the State in and to the Columbia Canal, Authorized to be Transferred under an Act entitled 'An Act to Incorporate the Board of Trustees of the Columbia Canal, to Transfer to the said Board the Columbia Canal, with the Lands Now Held therewith, and Its Appurtenances, and to Develop the Same,' Approved December 24, 1887, and Acts Supplemental or Amendatory thereof, Shall Revert to the State by Reason of and on Account of the Violation of the Conditions Contained in said Acts, and to Provide Provisions Relating to the Operation, Management, Control, Disposal or Sale of said Canal." (30 *Stat. S. C.*, 348.)

Whereas, the act of the General Assembly of the State of South Carolina, entitled "An Act to incorporate the Board of Trustees of the Columbia Canal, to transfer to the said board the Columbia Canal with the lands now held therewith, and its appurtenances, and to develop the same," did authorize the transfer, assignment and release of all the right, title, and interest of the State of South Carolina in and to the said Columbia Canal and the lands then held therewith, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, together with all the appurtenances thereunto belonging, to a Board of Trustees, incorporated by said act, for the use and benefit of the city of Columbia, for the purposes in said act specifically set forth, and subject to the performance of the con-

ditions and liminations therein prescribed on the part of the said Board of Trustees and their assigns, and did further provide that the canal, when enlarged, as prescribed in said act, shall develop at least ten thousand (10,000) horse power at the south side of Gervais street, and did further provide that the said canal shall be open for navigation free of charge by the said Board of Trustees, the State reserving the right to make such improvements in the canal as may be necessary to make navigation of said canal more rapidly than can be accomplished by the board under this Act, and that, by the provisions of said Act, the said Board of Trustees, within two years from the ratification of the Act, should complete the said canal so as to carry a body of water one hundred and fifty (150) feet wide at the top, one hundred and ten (110) feet wide at the bottom and ten (10) feet deep, from the source of the canal down to Gervais street, and shall, as soon as practicable, complete the canal down to Congaree River a few yards above the mouth of Rocky Branch: *Provided*, however, that the right of the State to the free use of the five hundred (500) horse power of water power shall be absolute, and any mortgage, assignment, or other transfer of the said canal by the said Board of Trustees or their assigns, shall always be subject to this right, and, further, authorized the Board of Trustees to issue bonds to the amount of two hundred thousand ($200,000.00) dollars, bearing a certain rate of interest, and to use the proceeds for the construction of the said canal, more particularly set forth in said Act, and,

Whereas, in other particulars there are conditions prescribed by said Act for the benefit of the State and her citizens enjoined, and,

Whereas, it now appears that notwithstanding the lapse of time, from December 24, 1887, to the present day, the Board of Trustees of the Columbia Canal, or its assigns, have failed and neglected to fulfill the conditions hereinabove set forth, and refused to perform the said conditions, and have further neglected to keep in proper repair and open for navigation

the said canal, and to remove the damage and injury that is being committed to the property so authorized to be transferred by the General Assembly of the State of South Carolina, under the aforesaid Act, now,

SECTION 1. Conditions of Act Not Complied With—Title to Canal Reverts to State.—Be it enacted by the General Assembly of the State of South Carolina, that the conditions of the Act of the General Assembly hereinabove mentioned, and the acts supplemental or amendatory thereof, have not been complied with, but that the same have been disregarded, and by reason thereof the right, title, and interest of the State to the said Columbia Canal, its appurtenances and the lands held therewith, so transferred by virtue of said Acts, have been forfeited and reverted to the State.

SEC. 2. Canal Commission—Powers.—That the Attorney General and the Chairmen of the Judiciary Committees of the Senate and House of Representatives, the Chairman of the Finance Committee of the Senate and the Chairman of the Ways and Means Committee of the House of Representatives, be, and they are hereby, empowered and authorized and directed, or a majority of them, ninety (90) days after the approval of this Act, to make such re-entry for and in behalf of the State as may be necessary and proper under the circumstances, and to take such steps as may be lawful and proper in the premises to obtain possession and control of the property of the said Columbia Canal, its appurtenances and the lands held therewith, and the improvements placed thereon by those in possession, which have become a part and parcel of said canal, unless the claimants enter into arrangements satisfactory to said officers as herein provided, and, further, to take such possession, control, and direction of the development of the water power originally contemplated by said Acts, and to dispose of the same, in such way as they may deem advisable and proper, for the interest of the State.

SEC. 3. Procedure by Attorney General.—That the Attorney General, for and in behalf of the State, do at the time

provided for the re-entry or thereafter, commence such proceedings as he may deem proper and advisable, in any of the courts of this State, to assert the right of the State in and to said canal property, as hereinabove described, and the structures and improvements placed thereon, which have become a part of said canal, and for the further protection of said canal from injury and neglect, for keeping the same in proper condition and repair, and, further, that he is empowered and authorized to bring such action for such damages as the State of South Carolina has suffered by reason of the failure of the assignees and conveyees of the Board of Trustees of said property to perform the conditions contained in said Acts hereinabove mentioned, and in the several conveyances thereto made to them from the said Board of Trustees, and enjoined and provided for in said acts; such action or actions so brought by him, for and in behalf of the State, shall not be any bar to any action that may be brought by any individual or corporation for any special damages done or sustained by him or it; that such action or actions so brought by the Attorney General, for and in behalf of the State, and its citizens, for violation of or injury to the rights of said State, and for the violation of the liabilities and conditions prescribed by said Acts, incurred by the grantees of said canal property, as herein described, shall be exclusive, and the said Attorney General may employ such counsel to assist him in carrying out the provisions of this Act, with regard to bringing such action, or any other action, contemplated by this act, as he may deem advisable, such counsel to be subject to the approval of a majority of the officers mentioned in section 2, and that an appropriation therefor be made in the General Appropriation Act, as a part of the current expenses of the Government.

SEC. 4. Compensation.—That the said officers shall, for their services, be paid, for the actual time engaged in attending to the duties prescribed by this Act, their expenses and a per diem which shall equal that of a member of the General Assembly in attending upon their meetings.

SEC. 5. Officers May Make Agreement.—That the said Attorney General, and other officers herein mentioned, who are authorized to take charge of and control of said canal property, be, and they are hereby, given full power and authority to enter into any such arrangements or agreements with the parties claiming to have any right, title, or interest in the premises, as they may deem advisable and proper to protect the interest of the State, the same however to be made within ninety (90) days from the approval of this Act, and report the same to the General Assembly for its approval at its next regular session.

SEC. 6. Arrangements which May be Made.—That the officers hereinabove mentioned, for the protection of the interest of the State, may receive and make such propositions for the disposal of said canal, and its appurtenances and improvements, and the lands held therewith, or for the completion thereof by anyone taking over or holding the same, according to the plans heretofore specified, or upon such modified plans as they deem advisable; and, for the purpose of extending and completing the said canal to insure adequate connection with and into the Congaree River for the purpose of navigation, as well as the development of power, they may employ such competent engineers as they may deem advisable for their information and action, with regard to the management and disposal of said canal; and, futher, that they may enter into such arrangements with the mortgage bondholders of the Columbia Canal as to protect the interest of the State and the interest of said bondholders; and may enter into such agreements or arrangements, or take such action as they deem advisable with regard thereto, which shall not be in conflict with any contractual obligations of the State made by the Acts heretofore passed with regard to the issuing of said bonds and the mortgaging of said property.

SEC. 7. Negotations with U. S. as to Nitrate Fixation Plant.—That the officers provided for in section 2 hereof, or a majority of them, are hereby empowered and authorized to enter into and conclude negotiations with the United

States Government that will fully insure and protect the navigability of the said Columbia Canal from the Congaree River to the Broad River, and should such arrangements be consummated, are further authorized, empowered and directed to convey to the United States Government, all rights, equities, title and interest of every nature whatsoever in the said property or properties which the State of South Carolina owns, and upon such terms as they may deem proper and the agreement on the part of the United States Government to locate, maintain and operate on the Congaree River in or near Columbia, a Federal nitrogen fixation plant under the terms of the Federal Act, known as the Smith Nitrate Bill, and the further agreement by the said United States Government to protect and conserve the navigability of the said canal in conformity with the terms of said agreement.

SEC. 8. Action Hereunder to Have Precedence.—That on account of the emergency which has arisen with regard to the present condition of said canal, and of the failure of the present owners, or those claiming to own the same, all action or actions, which are hereby authorized to be brought by the Attorney General in any Court of this State, shall take precedence of all others, and shall be expedited as far as it is practicable in the Courts of this State.

SEC. 9. No Bond Required—Inconsistent Acts Repealed.—That no bond shall be required of the state in any action, either at law or in equity, in its behalf, as any preliminary for obtaining an injunction or any other procedure. That all Acts and parts of Acts inconsistent with this provision be, and the same are hereby, repealed.

SEC. 10. Immediate Eeffective.—That this Act shall take effect immediately upon its approval by the Governor, or in accordance with the provisions of the Constitution.

Approved the twelfth day of March, A. D. 1917.

Ordinance of City of Columbia.

(P. 37.)

Ordinance of the City of Columbia.

An Act Concerning the Internal Improvement of the State.

(This Ordinance is not copied for the reason that it is a verbatim copy of the Act of December 21, 1822, 6 Stat., 189, printed herein at page —.)

Ordinance of City of Columbia.

(P. 43.)

Ordinance of City of Columbia.

An Act Concerning the Canals of the State, and for Other Purposes.

(This Ordinance is not copied for the reason that it is a verbatim copy of the Act of December 20, 1825, 6 Stat., 214, printed herein at page —.)

Constitution of South Carolina—1868.

ART. VI, SEC. 1. *Eminent Domain.*—The State shall have have concurrent jurisdiction on all rivers bordering on this State, so far as such rivers shall form a common boundary to this and any other State bounded by the same, and they, together with all other navigable waters within the limits of the State, shall be common highways, and forever free, as well to the inhabitants of this State as to the citizens of the United States, without any tax or impost therefor, unless the same be expressly provided for by the General Assembly.

Constitution of South Carolina—1868.

ART. 1, SEC. 40. *Freedom of Navigable Waters.*—All navigable waters shall remain forever public highways, free to the citizens of the State and the United States, without tax, impost or toll imposed, and no tax, toll, impost, or wharfage shall be imposed, demanded, or received from the owner of any merchandise or commodity, for the use of the shores, or any wharf erected on the shores, or in or over the waters of any navigable stream, unless the same be authorized by the General Assembly.

Constitution of South Carolina—1895.

ART. 1, SEC. 28. *Navigable Waters Free—No Tax for Use of Wharf.*—All navigable waters shall forever remain public highways, free to the citizens of the State and the United States, without tax, impost or toll imposed, and no tax, toll, impost, or wharfage shall be imposed, demanded, or received from the owners of any merchandise or commodity for the use of the shores or any wharf erected on the shores or in or over the waters of any navigable stream unless the same be authorized by the General Assembly.

Constitution of South Carolina—1895.

ART. 14, SEC. 1. *Boundary Rivers.*—The State shall have concurrent jurisdiction on all rivers bordering on this State, so far as such rivers shall form a common boundary to this and any other State bounded by the same, and they, together with all navigable waters within the limits of the State, shall be common highways and forever free, as well to the inhabitants of this State as to the citizens of the United States, without any tax or impost therefor, unless the same be expressly provided for by the General Assembly.

Professor Le Conte's Report.

(*Reports and Resolutions, Session,* 1877-78.)

COLUMBIA, *January* 8, 1866.

To His Excellency James L. Orr, Governor of South Carolina:

SIR:

In conformity with your instructions I have executed a survey of the "Columbia Canal," from its head to its mouth, and beg leave respectfully to report:

1. Dam at the Head of the Canal.

By constructing a dam from the stone work constituting the lock at the head of the canal to the adjacent island in the river, and by extending up the river the dam now existing at the northern extremity of said island, almost *any amount* of water may be thrown into the canal. A dam about one hundred and ten feet long and five feet high, extending from the lock to the island, would supply more than double the quantity of water now furnished to the canal. In case a still larger supply of water is demanded, and it is found that the lock is not large enough to admit the required amount, the dam to the island may be so placed as to throw in an additional supply at the lower extremity of the lock.

2. Enlargement of Canal Above Bridge Street.

The length of the canal, from its head to Bridge (Gervais) street, is 5,090 yards. Between these two points I found its *present* average dimensions to be as follows:

Width at top	15 feet
Width at bottom	3 feet
Depth	2½ feet

In the absence of the documents necessary for ascertaining its *original* dimensions, we may, without sensible error, estimate them to have been as follows:

Width of top	15 feet
Width of bottom	8 feet
Depth	4 feet

Hence, to *double* its *original* capacity from Bridge street to its head would require the removal of 39,307 cubic yards of materials, as follows: 36,107 cubic yards of earth; 3,200 cubic yards of stone.

From Bridge street to the mouth of the canal near Granby no supply of water is at present received from the river, all of it being turned into the river near the foot of Bridge street. Nevertheless, the canal is by no means obliterated. In fact, although in some places trees from three to six inches in diameter have grown up in its bed, yet it is much less filled up than might be expected. Moreover, this portion of the canal is about twenty-five feet wide at the top, ten feet wide at the bottom, and at *least* of an average depth of two feet.

Its length between Bridge street and its mouth being 3,564 yards, the removal of 22,176 cubic yards of earth (there is no stone) would give this portion of the canal a capacity equal to *double* its original capacity above Bridge street.

4. Height of Canal Above River at Different Points.

The following are the results of the leveling operations. The numbers indicate the height of the *surface* of the water in the canal above the surface of the water in the river at the nearest adjacent point. As the river was *above* mean water level, the results may be regarded as somewhat *below* the truth in ordinary stages of the river:

Above Bridge street:

	Height of fall.
Foot of Bridge street	19 feet 1 inch
Foot of Lady street	18 feet 10 inches
Foot of Washington street	18 feet 6 inches
Foot of Plain street	17 feet 8 inches
Foot of Taylor street	15 feet 7 inches
Foot of Blanding street	13 feet 11 inches
Foot of Laurel street	12 feet 7 inches
Foot of Richland street	11 feet 2 inches
Foot of Lumber street	10 feet 5 inches
Foot of Upper street	10 feet 00 inches
294 yards above Upper street	8 feet 00 inches
624 yards above Upper street	7 feet 6 inches
955 yards above Upper street	7 feet 00 inches
1,328 yards above Upper street	6 feet 6 inches

Below Bridge Street:

Foot of Senate street	19 feet 10 inches
Foot of Tobacco street	21 feet 00 inches
Hamburg Railroad Crossing	25 feet 00 inches

In consequence of the greater *height of fall* below Bridge street, and the greater breadth of high land lying between the canal and the river, this portion of the canal is better adapted for the erection of machinery.

5. General Remarks.

I beg leave to add a few remarks in relation to the amount of water power which the canal will furnish. Assuming its original capacity to be *doubled,* and the *average* available head of water between Bridge and Upper streets to be fourteen feet, it follows: That the use of the water necessary for driving machinery to the extent of 145 horse-power would require a current in the canal of an average velocity of sixty feet per *minute,* or *one* foot per second.

Below Bridge street, assuming the available head to be twenty-one feet, the same amount of water would drive machinery to the extent of 218 horse-power.

Of course if the velocity of the current is greater than in the above estimate the available power will be augmented in the same ratio. Thus, if the current flows at the rate of two feet per second, the driving power would be 290 and 436 horse-power in the respective cases.

The very *extensive* employment of the water for machinery may, ultimately, require a much *greater* enlargement of the canal. To enlarge the present canal so as to measure fifty feet wide at the top, forty feet wide at the bottom, and five feet deep, would require for its *whole* length from its head to its mouth (8,654 yards) the removal of

177,237 cubic yards of earth.
12,200 cubic yards of stone.

Such a canal, with a current of sixty feet per minute and a head of fourteen feet, would supply water to the extent of 355 horse-power; and with a head of twenty-one feet, to the extent of 532 horse-power. With a current of two feet per second, the power becomes 710 and 1,064, respectively.

If the machinery *does not* run at *night*, the supply of water, and consequently the available power, might be doubled by collecting the water in ponds or reservoirs along the course of the canal. Several such reservoirs exist both above and below Bridge street. By this means the numbers expressing the water power in the foregoing estimates may be *doubled*.

As the supply of water which may be turned from the river into the canal, at its head is almost unlimited, the canal can be enlarged to an extent commensurate with the demand for water power. If desired, it may be made to supply water to the extent of 5,000 horse-power or more. In fact, by very simple arrangements, *one-third* or *one-half* or even more of the whole volume of water in Broad River might be turned into such an enlarged canal.

In the event of so great an enlargement the locks, gates and other stone structure would have to be removed or enlarged; but the materials could be made available in the alteration.

The banks of the canal are broken and otherwise injured at various points between its head and its mouth, but they can be readily repaired.

Respectfully submitted,

JOHN LE CONTE.

Report of the Canal Commission.

(*Reports and Resolutions, Session* 1878, *pp.* 376-77.)

The Committee appointed under the provisions of an Act entitled "An Act to authorize and empower the appointment of a Commission to control and direct the development and disposal of the property of the State known as the Columbia Canal and its appurtenances," respectfully submit the following report:

The Committee met at Columbia on May 15, 1878, and organized by electing R. S. McGaughrin as Chairman and John C. Haskell as Secretary. The Committee immediately notified the Columbia Water Power Company of its organization and its duties, and, being desirous to save to the State the delay and expense of litigation, invited proposals looking to the peaceable surrender of the canal to the Commissioners for the State. The negotiations so opened were continued some months and finally resulted in the agreement hereto annexed and marked Exhibit A.

The Commission then found itself in possession of the canal without means to proceed with the development directed by the Act above named, the first necessary step being to have a survey made, and plans and estimates by an hydraulic engineer of approved style and reputation. Cer-

tain citizens of Columbia being informed of this condition of affairs, and feeling great interest in the matter, generously came forward and offered to advance to the Commission such an amount as would be necessary for the survey and preparation of the plans and estimates for the development. The Commission having first distinctly stated to these citizens that, having no authority to borrow money, it could not promise repayment, accepted the aid, and now lay the facts before the General Assembly to act in the matter as it should deem proper.

After full and careful inquiry, the Commission employed Mr. Bryon Holley, of Rochester, New York, who is now engaged in the survey, and will submit a preliminary report and an approximate estimate of the cost of development in a short time.

A copy of the contract with Mr. Holley is hereto annexed and marked Exhibit B.

The survey and estimates will occupy some weeks. An approximate estimate of cost of development is hereto annexed and marked Exhibit D. The amount expended up to date and the amount estimated to be necessary to complete the survey and estimates is hereto annexed and marked Exhibit C.

The Commission asks for such action as the General Assembly may deem proper to enable it to carry out the provisions of the Act under which it is constituted.

All of which is respectfully submitted.

R. L. McCAUGRIN,
President Pro Tem.

JOHN C. HASKELL,
Secretary.

Exhibit (A).

STATE OF SOUTH CAROLINA:

This agreement between the Columbia Canal Commission, appointed in accordance with the provisions of the Act of the General Assembly No. 412, approved March 12, 1878, of the first part, and Sullivan Fenner, as assignee and grantee of the Columbia Water Power Company, of the second part, witnesseth that the said Commission, for itself, and the said Sullivan Fenner, for himself, his heirs, executors, administrators and assigns, do hereby mutually covenant and agree:

I. The said Sullivan Fenner to give immediate possession of the Columbia Canal, with its appurtenances and the Lynch property adjacent thereto.

The water power of the canal now used in supplying the City of Columbia with water not to be interfered with by the Commission, except that the said power may be temporarily interfered with when it is deemed necessary in the development of the canal in the opinion of the engineer in charge, approved by the Commission, and after five days' notice to the corporate authorities of the City of Columbia.

II. The said Sullivan Fenner covenant to execute a warranty title to the State to the aforesaid Lynch property, and, if desired, also to execute a quit-claim deed to the said canal and its appurtenances on being furnished, subject to the terms of the aforesaid Act, with five hundred horse-power of water power at Gervais street for the use of himself, his heirs, executors and assigns.

III. The said Sullivan Fenner to be furnished, for the use of himself, his heirs, executors and assigns, with water power (when developed) at his sites below Gervais street upon the same terms with other parties, with the right to use the canal and banks adjacent to said sites for purposes connected with

the use of the water power furnished and manufacturing purposes at said sites, and with authority, if desired, to widen at his own expense the canal eastward below Gervais street opposite said sites.

In witness whereof the said Commission, by the Chairman under his private seal, attested by the Secretary of the said Commission, and the said Sullivan Fenner under his seal, have hereto set and subscribed their names at Columbia, South Carolina, this twenty-fifth day of September, A. D., 1878.

THE CANAL COMMISSION,
Per R. L. McCAUGHRIN, [L. S.]
Chairman.
SULLIVAN FENNER,
Per S. W. PEARCE, JR., [L. S.]
Attorney in Fact.

Attest:
JOHN C. HASKELL,
Secretary.

Signed, sealed and mutually delivered in duplicate before us.

(Signed) JAMES T. WELLS.
JAMES H. RION.

Exhibit (B).

BYRON HOLLEY, ESQ.,
Rochester, N. Y.:

DEAR SIR:

I am instructed by the Canal Commission to state to you that it accepts your proposition to make survey, estimate and plans for the development of the water power known as the

Columbia Canal; your compensation to be ten dollars per day and all your expenses paid. Office, stationary, fuel and all necessary assistance to be presented to you by the Commission.

Respectfully,

JOHN C. HASKELL,
Secretary Canal Commission.

Accepted:

(Signed) BYRON HOLLEY, *C. E.*

Exhibit (C).

JOHN C. HASKELL,
Secretary Canal Commission:

In account with fund received on account of Canal Commission:

To total cash received by sundry drafts	$555.45
By cash paid Mr. Holley and sundry expenses as per vouchers	550.90
Balance on hand	$4.55
Amount estimated to complete the survey	$1,240.00
Total	$1,800.00

COLUMBIA, S. C., *December* 3, 1878.

Respectfully submitted,

JOHN C. HASKELL,
Secretary Canal Commission.

Exhibit (D).

Memoranda and Approximate Estimate of the Cost of Developing the Water Power at Columbia, South Carolina.

The proposed plan contemplates locating the dam, bulkhead and lock near the head of the present canal.

The line of location of canal will follow for the greater part of the distance that on the present canal, thereby utilizing the work already done. Where necessary to avoid expensive rock cutting the line will be thrown outward towards the river by constructing an embankment. The prism of canal to have a minimum width of bottom of 100 feet, at surface of water 140 feet, at a depth of 10 feet, with a bottom grade or fall of 0.02 feet per 100 feet, which will theoretically furnish, on an average fall of 22 feet, 11,260 horse powers, or, on a fall of 25 feet, 12,780 horse powers, and, on a fall of 29 feet, about 14,840 horse powers.

It is proposed to raise the water at the head of the canal about three feet above the present level, which will, with the conditions above expressed, give a fall for power of 29 feet at Gervais street, beyond which point no examinations have as yet been made.

All masonry to be constructed of granite rock laid up in hydraulic cement mortar.

Approximately the cost of dam, bulkhead, and lock will be	$110,000
Three miles of canal and structures	140,000
Add for contingencies, engineering, land damages, etc.	25,000
Total	$275,000

About 60 per cent of the cost of dam, bulkhead, etc., will be in common labor and from 70 to 80 per cent of other work. The foregoing may vary to the amount of ten per cent.

(Signed) BYRON HOLLEY,
Engineer.

Joint Resolution, June 7, 1877.

Joint Resolution to Appoint a Commission to Investigate the Sale of the Columbia Canal (16 *Stat.*, 316).

SEC. 1. *Be it resolved* by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That a Commission consisting of the Attorney General and three members of the General Assembly, two of whom to be appointed by the Speaker of the House and one by the President of the Senate, be raised for the purpose of investigating the sale of the Columbia Canal and its appurtenances by a Commission of this State.

SEC. 2. That it shall be the duty of said Commission to inquire into the manner of said sale, the consideration received by the State therefor, and whether or not the State is bound thereby, and also to inquire whether the purchasers have duly complied with the conditions of said sale, and whether the title to the said property has not reverted to the State by reason of the non-compliance with the conditions of said sale.

SEC. 3. That said Commission shall have power to call for persons and papers, and to administer oaths to witnesses before them, and that a majority of the members of the said Commission shall have power to act in all cases.

SEC. 4. That such Commission shall conduct said investigation without delay, and report the result to the Governor to be by him transmitted to the General Assembly, and that until the meeting of the General Assembly the Governor is authorized to take such action on the report as may be necessary to protect the interest of the State and others.

Approved. June 7, 1877,

Concurrent Resolution, Acts 1911, p. 447.

A Concurrent Resolution Referring a Concurrent Resolution, Passed February 16, 1910, and Unacted Upon by the Governor, to the Present Governor for Action Thereon.

WHEREAS, A Resolution concurred in February 16, 1910, was not acted upon, which Resolution reads as follows: "A Concurrent Resolution to provide investigation and report of Governor upon advisability of requiring lessees to comply with terms of lease from State and complete Columbia Canal in accordance with lease.

WHEREAS, the Columbia Canal, constructed at great expense to the State of South Carolina, primarily as a navigable highway, and waterway connecting the waters of Congaree and Broad rivers, was assigned, transferred, and released by the State to the city of Columbia, its lessees and successors, by Act approved December 24, 1887, and acts amendatory thereto; and,

WHEREAS, in consideration of the rights, benefits, and franchises appurtenant to the said cause, said lessees assumed certain duties and obligations to the State, one of which was the requirement as set out *inter alia,* in section 7 of said Act, "shall as soon as practicable, complete the canal down to the Congaree River," etc.; and,

WHEREAS, on the — day of March, next, it will be eighteen years since the work on the construction of said canal was suspended, and said canal completed to Gervais street, in the city of Columbia; and,

WHEREAS, in order to get appropriations from Congress for the improvement of the navigation of the Broad River above Columbia it is necessary that the State require the said city and its lessees to complete the canal down to the Congaree River; and further,

WHEREAS, the city of Columbia undertook to obstruct said canal by constructing its water mains across the same, which obstruction the Supreme Court declared to be a public nuisance; now, therefore,

Be it resolved by the House of Representatives, the Senate concurring:

First. That it is to the interest of the State that said canal be completed to the Congaree River in accordance with the terms of the conveyance and lease from the State.

Second. That His Excellency, the Governor, be requested to investigate and examine into the advisability of requiring of said lessees the completion of said canal in accordance with the original plan of construction as contemplated by the said act, and report the same to the General Assembly at its next session; and,

WHEREAS, said canal has been decreed by the Supreme Court to be a navigable water way and highway of this State, the completion of which will materially subserve the welfare of the city of Columbia, and State at large;

Now, Therefore, Be It Resolved by the House of Representatives, the Senate concurring; that the attention of the Governor be directed to the said Concurrent Resolution, and that he be requested to take such final action thereon as will best subserve the public interests of the State.

Message of Governor James L. Orr.

(House Journal of 1866.)

Message No. 1.

EXECUTIVE DEPARTMENT,
COLUMBIA, SOUTH CAROLINA, *November* 27, 1866.

GENTLEMEN OF THE SENATE AND HOUSE OF REPRESENTATIVES:

The Penitentiary.

Pursuant to the provisions of the act of the late extra session, to establish a penitentiary, I appointed Messrs. William Gregg, of Edgefield; William R. Robertson, of Fairfield, and Archibald Cameron, of Charleston, Commissioners of the Penitentiary to select and procure a site and to erect a suitable temporary enclosure and temporary cells. They have performed the duty of selecting and procuring the site, and have ordered the work on the cells to commence. I submit to you herewith their report, together with the plans, estimates, and drawings of the entire establishment, prepared by Capt. T. B. Lee, the engineer and architect. The site is within the corporate limits of the city of Columbia—a plateau of several acres of level surface, with a bold bluff on the canal, rising some sixty feet above the level of the river. A tract less than half a mile, nearly at grade, will connect the building with the Greenville Railroad at a point one-half a mile from the depots of the South Carolina and Greenville and Columbia railroads. The water now running through the canal will furnish all the motive power that will be needed for many years. Its accessibility from every part of the State by railroad, and the facilities thereby afforded for the transportation of prisoners, provisions and materials, and for shipping the supplies manufactured, make it a most

admirable and advantageous location. Granite, in inexhaustible quantities can be procured, if not within the walls, certainly within a stone's throw of them, without any cost of transportation. Its location, within the city limits, will allow the number of guards to be reduced greatly below the force which would be requisite for the safe-keeping of the prisoners in remote localities where the population is sparse. It is believed by the architect and engineer having the work in charge that cells may be in readiness by the first of January to receive convicts.

The engineer and architect estimates the appropriation needed for the rapid and successful prosecution of the work for the next year at forty-five thousand dollars.

I directed the Commissioners who were ordered to sell the buildings, machinery, etc., of the State Works at Greenville, to reserve such machinery as might be usefully employed in the manufacture of wood and iron in the penitentiary, when fully in operation. The reservation was made and there will be in the future only a trifling outlay needed for machinery to operate most branches of manufactures of wood and iron.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 297.

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM ELLIOTT,
J. B. S. LYLES,
R. B. HERBERT,
W. C. McLAIN,
Attorneys for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 297.

COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Reply on Facts.

The Act of 1922 creating a commission to take charge of this property if this court should affirm the judgment of forfeiture is printed as an appendix to this brief. The court will note that section 4 particularly directs this commission to take the improvements placed on this property, as well as the property itself, and, further, that while section 6 does

contain some provisions that speculate as to the completion of the canal in the dim and distant future, section 5 provides very positive duties for the immediate management and disposition of the property on behalf of the State and section 9 seeks to invoke the protection of the sovereignty of the State on behalf of this new commission for some undisclosed reason.

The brief for the State asserts that section 6 of the Act of 1912 (page 92 of our former brief) "insisted upon the completion of the canal." We submit that this is not an accurate statement. The Act of 1912 granted defendant the right to construct and maintain a dam across the Congaree River and the Columbia canal near the confluence of the Broad and Saluda rivers—a substantial right and privilege—and section 6 provided that if defendant should accept this act it would be deemed to have contracted, covenanted, and agreed with the State that it would complete the canal within such time as the court should fix, and that if it should fail to so complete within such time that it would pay to the State such sum of money in lieu of such completion as the court might determine to be reasonable. Defendant did not accept the act.

We submit that this statute shows, first, that the Legislature was then in serious doubt as to whether defendant was under any obligation to complete the canal—and it was equally reasonable for the defendant to be under such doubt—and, second, that if such obligation existed the State was willing to accept a money compensation in lieu thereof. It was this statute that suggested this latter thought to counsel for defendant and caused them to offer the present canal commission a money settlement to dispose of this controversy.

The last paragraph of the State's brief, on page 61, points out that section 24 of the statute of 1887 (page 79 of our former brief) makes that statute of force only for 31 years and asserts that "as soon as is practicable" must mature within that period. At another place the same brief argues at great length that the Act of 1890, as an amendment of the Act of 1887, must be construed as a part thereof (see last paragraph on page 23), and criticizes our brief for taking a contrary position. This, of course, we do not do, as we recognize the soundness of this position. When, therefore, the Act of 1890 amended the Act of 1887 by allowing a sale in perpetuity this amendment necessarily superseded any time limit on the transaction.

In his oral argument, Mr. Lyon, on behalf of the State, cast doubt on the ability of the defendant to finance the completion if this should be ordered. In his brief (bottom of page 11) he states that this ability "was unquestioned" and we concede that he proves this printed statement by citations from the record.

The State's brief has a great deal to say (beginning at page 12) about certain mortgages executed by defendant below and about its relations with Parr Shoals Power Company, which latter company constructed a dam and a modern hydro-electric plant across Broad River about 26 miles above Columbia for the purpose of furnishing necessary additional power to this community. There is a great deal of testimony in the record with reference to this Parr Shoals dam, to all of which we objected as being entirely irrelevant to the issues on trial and which we still deem to be entirely irrelevant. The Parr Shoals development was promoted by defendant, and that company is a subsidiary of defendant.

(See Columbia Railway, Gas & Electric Company *vs.* S. C. Tax Commission, Advance Sheet No. 3 of 119, S. C., page 480; 112 S. E., 267). The brief for the State (page 10) claims that the canal has been abandoned and cites the details of the returns of gross receipts for taxation to show the increase in the use of Parr Shoals and the decrease of the canal, and, further, claims that the earnings of the canal have vanished and the assets appear as those of Parr Shoals. The State's witnesses Wallace (pages 98-99 of Record), Ludlow (pages 55, 57, 62, 97), Lee (page 98), and defendant's witnesses Crane (page 110), Tew (page 128), and Shand (page 104) conclusively demolish any suspicion that the canal has been abandoned. The returns of the two companies for gross receipts were each made "in connection with the return" of the other, and, in accordance with modern engineering practice, the two plants are used to supplement each other—that is all. The operating agreement (Exhibit 19, page 174 of the Record) shows the relations between the two companies, and this agreement was held to be a perfectly valid lease by the Supreme Court of South Carolina in the Tax Commission case above cited, although its validity was attacked in that litigation by the same counsel for the State.

The State's brief (page 12) also intimates that the northern half of the canal does not develop 10,000 horse-power at Gervais street. There is not a thread on which to hang this insinuation. (See testimony of witnesses for the State as follows: Ludlow, page 55, "something over 11,000 horse-power at Gervais street;" Lee, page 98, "they develop 11,000 horse-power at Gervais street.") Defendant's witness Shand puts it at 10,281 horse-power (see page 105) and no witness places it under 10,000.

The State's brief (page 15) claims that the Legislature postponed action on various resolutions because of the representations or at the instance of defendant. We do not deem this an accurate statement, but, assuming that the same be correct, it shows that the question was fairly raised, and that the legislative action was deliberate in refusing or failing to call for completion, and there is no suggestion that any representations made by defendant were even inaccurate in fact, in present or in future. This whole matter is fully covered in our former brief beginning on page 11. The statement of Alfred Wallace (referred to on page 15 of the brief for the State) was merely the vague impression of an operating agent of defendant who had nothing whatever to do with the dealings of the Legislature and can have no significance whatsoever.

In this connection we would point out that a number of resolutions, statements, ordinances, and various other exhibits are printed at the back of the State's brief which were not placed in evidence and are no part of the record of this case. While the courts in this State will take judicial notice of statutes this does not apply to these other exhibits, and even if they have any possible bearing on the question here, which we seriously doubt, they are not properly before the court for consideration. The court will note that every exhibit that we rely on was properly introduced in evidence and is a part of the record.

Mr. Lyon, for the State, in his oral argument, contended that the State has received nothing from the conveyance of this property. As we point out on page 4 of our former brief, the Columbia Water Power Company paid something, and the contract of sale between that company and defendant

(introduced by the State) shows that defendant paid $600,000.00 in cash, as well as other considerations. (See Exhibit 20, page 185 of Record.) The suggestion that the 1,500 horse-power, of which 500 was to be furnished to the State, 500 to Sullivan Fenner, an assignee of the State, and 500 to the city of Columbia (section 7 of act of 1887, page 73 of our former brief) was not a consideration to the State seems to us to answer itself. At the time the Act of 1887 was passed there was no canal developed and no horse-power. In addition to this, even when the canal was developed, horse-power cannot be continuously furnished without the operation of machinery, so that the furnishing is in itself a consideration. Horse-power does not exist even when the canal is developed; it must be created at some expense to somebody.

In closing this statement we would respectfully emphasize to the court that there is nothing now before the court with reference to any failure of defendant or its predecessors to carry out any of the covenants or obligations relating to the construction or operation of the northern half of the canal above Gervais street. While the complaint does contain such allegations based on the declarations of the Act of 1917, the verdict was directed below and the judgment of forfeiture sustained solely because of the alleged breach of condition in failing to complete the southern half of the canal below Gervais street. (See page 17 of former brief.) The mass of testimony, therefore, and the numerous statements in the brief for the State referring to these matters are entirely irrelevant here. But we insist that all of the testimony on both sides conclusively establishes that there was no failure whatsoever as to any covenant or obligation relating to the northern half of the canal.

Force and Effect Was Given to the Act of 1917.

In reply to the State's brief on this point, we summarize below particulars in which the Act of 1917 was given force and effect as a law impairing defendant's contract:

Subdivision (*a*): The Act of 1917 caused the courts below to refuse to consider the equities of the case and foreclosed consideration of the question of waiver. (See assignments of error 7, 8, 9, and 10, R., p. 226.)

An examination of the complaint will show that this case was brought under the Act of 1917. Paragraph 11 of the complaint sets out that the General Assembly by act declared that the canal had been "forfeited and reverted to the State" (R., p. 17). The complaint does not pray an adjudication of forfeiture; the Legislature had already forfeited the property. The complaint prayed merely for possession and for damages from the time re-entry was attempted under the Act of 1917.

The Circuit Court on the trial recites the declaration of forfeiture by the Legislature and holds that the further declaration of the Legislature that failure to complete the canal "was a failure to fulfill the contract" is entitled to some respect, but the court "has the right" to enquire into the facts as found by the Legislature and determine if they were true.

The implication here clearly is that the court has the right to examine the facts, but has not the right to exercise a judicial judgment as to whether or not such facts should call for the drastic remedy of forfeiture.

That such was the opinion of the Circuit Court is not even doubtful for he declares that

> "Under the evidence the act of the Legislature declaring the forfeiture * * * is binding on the court."

In other words, the Legislature had declared that certain facts existed and on these facts had declared and enacted a forfeiture. The trial court found that these facts did exist and exercised no independent judgment as to whether such facts would justify a forfeiture under the law as it existed, but held that the declaration of forfeiture was binding on the court.

It is true that in directing the jury to bring in a verdict the trial court stated that the Legislature was justified in declaring a forfeiture. This bald declaration, however, is not sufficient to show that his honor had considered the equities of the case and the many reasons why a forfeiture should not be decreed, which it was his duty to have done and which he doubtless would have done but for the force of the act which his Honor considered binding. So the court merely directed the jury "to find a verdict for the plaintiff for the property in dispute" and gave further force to the Act of 1917 by telling the jury they might find damages from the time entry was attempted under the act. Incidentally, the jury found no damages, thereby indicating their opinion of the hardship that was being perpetrated (R., p. 207).

When we come to the opinion of the Supreme Court on the second appeal, which passed on the rulings of the trial court, we find the same tone of finality which runs through it, not only "as an unbroken thread," but also as the dominating and controlling force.

> The Court: "It is enough here to say that it has been decided that the complaint states a cause of action for forfeiture for a breach of condition, and if the plaintiff has proved its allegations it is entitled to the judgment sought" (R., p. 216).

Why not? In truth the complaint alleges that the Legislature had stated certain facts and on these facts had enacted and declared a forfeiture. The court "had the right" to enquire if the facts set out by the Legislature were true, but it had no right to enquire whether or not these facts would justify a forfeiture. The Legislature had decided that question for itself, for the opinion says, in unmistakable words, "The forfeiture was declared by the statute" (R., p. 218). We quote again:

> "His honor said the Act of 1917 was binding on the court under the evidence. It is binding not as a judicial decree, but it was binding in that it stated the conditions under which the State would waive the forfeiture, and the evidence showed that the condition had not been complied with" (R., p. 217).

Does the court consider here, or anywhere else, on what terms *the court* will relieve against the forfeiture? Not at all. The State, one of the parties to the contract, had stated its own terms and its action was binding on the court. The court was powerless to look into the circumstances and to determine whether or not these required a forfeiture.

One will look in vain through the South Carolina reports for a case where John Doe appeared before a court of equity and stated on what terms he would relieve against a forfeiture and the court held his terms binding on the court. But here the State, through its Legislature, had spoken.

We quote finally:

> "This court also held that the court has no power to waive the conditions * * *. There was nothing, therefore, for Judge Townsend, the presiding judge, to do but to direct a verdict for the plaintiff in the question of forfeiture" (R., p. 217).

Of course the courts do not make contracts and cannot waive the conditions of contracts, but courts do, nevertheless, look into the conditions and circumstances and decide for themselves whether or not they will exact a forfeiture or whether the forfeiture has been waived or whether the court will relieve against it. In this case the Legislature had done this for itself and there was therefore nothing for Judge Townsend to do but to bow to its will.

Where were the many circumstances urged by the defendant which a court of equity should consider before exacting the drastic and odious remedy of forfeiture?

The fact that the condition of forfeiture, if it was a condition, was not expressed;

That no demand had been made;

That the defendant had complied with all the other provisions of the contract which were expected to and did benefit the State;

That the State had sat silent for 25 years and continued to receive substantial benefits from defendant's performance;

That conditions had changed, rendering the necessity for completion doubtful if not useless;

That the State had admitted "It was at one time supposed that for navigation purposes it would not be necessary or expedient to extend the canal" (R., p. 44):

That the city of Columbia, the beneficiary under the contract, acting through its mayor, had declared that the completion of the canal would be "entirely useless" and a "useless expense" (R., pp. 190, 191, 192, 193, and 194);

That as soon as the contract was adjudicated the defendant had offered to complete;

That by the forfeiture the State would acquire and the defendant would lose a property many times as valuable as it had parted with—

These and other considerations would plead with trumpet tongues in any court anywhere for equity and justice between the parties, but in the trial and supreme courts they were dumb. They were not considered or even referred to. And certainly not. Had not the legislative guillotine fallen? The wells of equity were dried up. The Legislature had declared a forfeiture on the facts and its action was *binding* on the courts.

A brief comparison of the decision of the Supreme Court on the first appeal with the ruling of the trial court and Supreme Court on the second appeal will throw light on the subject. The decision on the first appeal construed the Act of 1917 to mean that the Legislature had declared that *"in its opinion* a forfeiture had been incurred and directed a judicial investigation" (R., p. 215).

The trial court in construing the Act of 1917 held that it "enacts" that the canal with its appurtenances "have been forfeited and reverted to the State" (R., p. 201). The Supreme Court on the second appeal sustains the trial court and refers to the Act of 1917 as " declaring a forfeiture (R., p. 217). "The forfeiture was declared by the statute" (R., p. 218).

It will be seen that the trial court and second appeal decision no longer look on the Act of 1917 as a mere expression of opinion by the Legislature that "a forfeiture has been incurred," as the first decision had done, but construed it as an enactment and declaration of forfeiture.

The first opinion directed a judicial investigation to determine whether, "under all the circumstances, the drastic remedy of forfeiture should be adjudged" (R., p. 215). The trial court and second appeal opinion say nothing of any circumstances under which forfeiture will be decreed or the matters of defense set up against the forfeiture. They say the mere facts on which the Legislature enacted and declared a forfeiture were true, but they do not for a moment consider whether those facts justified a forfeiture. The difference in the view of the Act of 1917 taken in the first opinion from that taken in the second opinion may be explained by the fact that Mr. Justice Hydrick, who wrote the first opinion, had died before the second appeal. At all events, the defendant never received the judicial investigation of the matter of forfeiture called for by the first opinion and to which it was entitled. The defendant's property was taken by the legislative fiat and not by a judicial investigation.

His honor the trial judge sat as a chancellor as well as judge, for the State Constitution provides: "Justice shall be administered in a uniform mode of pleading without distinction between law and equity." *S. C. Constitution of* 1895, *art.* 6, *sec.* 3.

Military Art Novelty Co. vs. Fayousky, 101 S. E., 818; 113 S. C., p. 470.

Fass vs. Fire Ins. Co., 105 S. C., 364; 89 S. E., 1040.

C., C. & A. Ry. Co. vs. Earle, 12 S. C., 54.

The courts of South Carolina have never allowed a forfeiture to be imposed until it has been judicially determined.

State vs. Spartanburg Ry., 51 S. C., 129; 28 S. E., 145.
Shand vs. Gage, 9 S. C., 196.

In *Hammond vs. Railway*, 15 S. C., p. 10, which was a case involving forfeiture under a condition subsequent (express condition), the court said:

> "And inasmuch as estates upon condition working forfeiture are odious, the courts have generally laid hold of any plausible feature to sustain the deed. * * *
>
> "Such conditions are not favored and must be construed strictly, and will under no circumstances be enforced further than may be absolutuely required. * * *"

In *White vs. Britton*, 75 S. C., 428; 56 S. E., 232, also involving an express condition subsequent in a deed, the court said: "The law does not favor forfeitures," and the court found a circumstance which relieved against the forfeiture.

In *Son vs. Shealy*, 112 S. C., 312; 99 S. E., 825, the very judge who wrote the opinion on the second appeal, Mr. Justice Frazer, in a case involving a forfeiture under an express condition subsequent said: "Forfeitures are not favored. The courts will not strain the construction to provide one."

In insurance contracts involving forfeiture the courts have shown the same disinclination to enforce a forfeiture.

> "Forfeitures are not favored in the law; and courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or any agreement to do so on which the party had re-

lied and acted." (Quoted with approval from *Hartford Ins. Co. vs. Unsell,* 144 U. S., 439; 12 Sup. Ct., 671; 36 L. Ed., 496.)

Powell vs. Ins. Co., 81 S. E., p. 655; 97 S. C., 375.

McMillan vs. Ins. Co., 58 S. E., 1020, 78 S. C., 433.

In cases involving the forefeiture of payments made by a vendee to a vendor under contracts providing for forfeiture of all payments on breach of contract the holding has been the same.

Ould vs. Spartanburg Realty Co., 77 S. E., 866; 94 S. C., 184.

Cooper vs. Rutland, 82 S. E., 994; 99 S. C., 100.

In *Rose Tin Mine vs. Cherokee Tin Mining Co.,* 88 S. E., 8; 103 S. C., 243, which was a case in which a lease provided that the lessee should forfeit all rights under the lease upon failure to work the mine, the Supreme Court, in a decision overruling the trial court, which had decreed a forfeiture, said:

> "It is a well-settled principle of equity that in proper cases it will grant relief from a forfeiture, also from a penalty, but it will not lend its aid to a plaintiff seeking to have a forfeiture declared or a penalty enforced."

In none of these cases, however, had the Legislature enacted and decreed forfeiture. The holdings of the court in these cases throw light on the rulings of the trial and the supreme courts on the second appeal and make it clear that but for the legislative fiat the circumstances of the case would have

been taken into consideration and the equities adjudicated. Why did the trial and supreme courts forfeit property ten times more valuable than all of the property ever forfeited by the courts of South Carolina before without even a casual mention of equity or the defenses of the defendant which should warrant a less drastic course? We submit that there is, there can be, but one answer. The courts were proceeding under the Act of 1917, which, they said, was binding on them.

In fairness to counsel for plaintiff in error, we point out that this position is not new. It was fully and repeatedly argued before and urged upon the trial court. (See R., pp. 50-52, 84, 92, and see grounds of motion for nonsuit, R., p. 104, and directed verdict for defendant duly made, R., p. 203, and quoted in exceptions 6, 7, and 9, pp. 210-211.) It was, of course, fully presented to the Supreme Court on the second appeal. It was overruled, we submit, because of the influence of the Act of 1917.

We affirm, in closing, that the trial and supreme courts refused to consider defendant's answer or evidence in support of it. We quote:

> *"For all practical purposes this case was tried and determined on demurrer.* (See 112 S. C., 528.) It is enough here to say that it has been decided that the complaint states a cause of action for forfeiture for a breach of conditions, *and if the plaintiff has proved its allegations, it is entitled to the judgment sought"* (R., p. 216. Italics added).

This is not quoted from the first opinion (on the demurrer). It is from the second opinion, after defendant had answered and introduced such evidence as allowed by

the trial court in support of its equitable defenses (including waiver). Why were these defenses and this evidence thrown out and refused consideration? Was it because of the Act of 1917?

Subdivision (*b*): The Act of 1917 treated the forfeiture as an accomplished fact. Coming from the law-making branch of the Government it necessarily and in fact enforced on the courts the idea that the legislative construction must be followed and the legislative mandate obeyed. We submit that had the Supreme Court of South Carolina followed its previous decisions (hereinbefore cited) it would not and could not have construed the Act of 1887-1890 as containing a condition. It departed from this rule because of the Act of 1917.

Subdivision (*c*): The Act of 1917 created the remedy of forfeiture when the only remedy under the contract was specific performance, or mandatory injunction, to obtain completion of the canal.

Subdivision (*d*): By its influence on the courts below, it changed the vague covenant "as soon as is practicable"—deliberately vague and uncertain when adopted—into a hard and fast condition so as to be sufficiently definite to support a forfeiture.

Subdivision (*e*): As amended in 1918, it resulted in a fishing expedition into defendant's records to secure evidence for plaintiff's case—see Act of 1918, page 102 of original brief, and *Robertson vs. Peoples*, decided January 4, 1919, but only recently reported in advance sheet No. 1 of 120 S. C., page 176—a method of obtaining evi-

dence essentially unfair and to defendant's prejudice, and yet given the State by the Act of 1917 as amended. See Transcript of Record, pp. 42, 128, 130-131. The time and circumstances of the passage of this so-called investigating Act of 1918 are most significant.

Subdivision (f): The Act of 1917 resulted in the exclusion of all of defendant's evidence not consistent with the trial judge's theory (caused by the Act of 1917) that "as soon as is practicable" meant within two years from 1894. See Transcript of Record, pp. 50-52, 65, 92.

Subdivision (g): As carried out by the Canal Commission created by it, the Act of 1917 resulted in such Commission declining to divulge the wishes of the State either as to a completion of the canal or a settlement of the controversy.

Subdivision (h): The Act of 1917 resulted in the State's refusal to accept defendant's offer to complete, which admittedly fulfilled the only covenant contained in the Act of 1887-1890 remaining unperformed.

Subdivision (i): It caused the trial judge to change the burden of proof and to direct a verdict against defendant.

The following detailed application of the principles announced by this court in pertinent cases is submitted in affirmance of the above propositions:

Terre Haute I. R. Co. vs. Indiana, 194 U. S., 579; 48 L. Ed., 1124:

We quote (page 587): "If, in the opinion of this court, the State had lost all right to demand any sum whatever

under section 23 of the charter, legislation to enforce such a demand is invalid, and may be pronounced so by this court, notwithstanding the fact that the cause of action now is based on the original act." So in our case, if there was no condition in the original Act of 1887-1890, the subsequent Act of 1917 to enforce a forfeiture is invalid.

We quote (page 587): "In this way the amendment of section 23 in 1897 is practically carried into effect. While repudiated as legislation it is adopted by construction and is found to express only the meaning of the original act." How well this fits the State court's treatment of the Act of 1917!

We quote (page 589): "The case then stands thus: The State court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation. It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. * * * We may add that it is admitted that one of the acts of 1897 was necessary to authorize a demand and so to create a cause of action. * * * But in our opinion the State had no right, in 1897, to make a demand." If there be no condition in the contract of 1887-1890, the result below cannot be reached, except on a wrong construction of the Act of 1887-1890, without relying on unconstitutional legislation. The State courts clearly did rely upon that to some extent. It is admitted that the Act of 1917 was necessary to authorize a re-entry and so to create a forfeiture. But the State in 1917 had no right to make a re-entry for forfeiture.

Carondelet Canal and Navigation Co. vs. Louisiana, 233 U. S., 362; 58 L. Ed., 1001:

We quote (page 376): "* * * but, of course, the fact that the Supreme Court did not refer to the Act of 1906 does not put it aside from consideration. If it was the assertion of legislative power against the contract of the company and a legislative provision against the obligation of the contract and was an essential, although unmentioned, element of the decision under review, it is a basis in the Federal question set up. * * * And this, we think, was the effect of the Act of 1906. It was treated as an important factor in the State's petition in both the charging part and the prayer. The board of control had something else to do besides to wait. It was an agency of invasion, and it was by its special command that the attorney general made demand upon the company."

The record on the second appeal below contains this statement: "This action is brought in the name of the State of South Carolina by the State officers constituting the Canal Commission, *by virtue of the authority, directions, and declaration of forfeiture contained in the Act of 1917*, to recover possession of the property known as the Columbia Canal, because of the failure and neglect of the Columbia Water Power Company and its assignee, the defendant, to fulfill the conditions contained in the acts of 1887 and 1890 and conveyances thereunder." (Quoted from page 31 of Transcript of Record. Italics added.) Did our Canal Commission have something else to do besides wait? Was it an agency of invasion? The record itself shows that this suit was brought by virtue of the *authority, the directions,* and *the declaration of forfeiture contained in the Act of*

1917. Does not the record itself answer the question whether force and effect was given the Act of 1917?

How was the Act of 1917 treated in the State's complaint? Section 11 of the complaint (page 11 of Transcript of Record) alleges that the General Assembly by the Act of 1917, quoting its title, *did find* that defendant and its predecessors neglected and refused to fulfill the conditions in the Act of 1887-1890 and neglected to keep the canal in repair and open for navigation, and then quotes section 1 of the Act of 1917, *which declares that the conditions have been breached and the canal forfeited*. Section 12 of the complaint (page 12 of the Transcript of Record) further quotes the Act of 1917 and alleges further steps taken by the Canal Commission thereunder, including the re-entry, all essential conditions precedent to this suit. Was the Act of 1917 (and the acts of the Canal Commission thereunder) an essential element of the decision below? It was a many-times-mentioned element. Is not this case much stronger than the *Carondelet* case?

The Acts of 1887-1890 and Conveyances Thereunder Made a Contract Within the Protection of the Federal Constitution.

The State's Brief, at pages 18-20, advances the suggestion that the canal is a governmental subject, held in trust for all the people in their sovereign capacity, inalienable by the State, and that the acts of 1887-1890 and conveyances thereunder constitute a mere license and are repealable at the pleasure of the State, so that the State may discharge her inalienable duty and trust.

As we recall the oral argument, Mr. Lyon practically

abandoned this position when questioned as to its logical extent by the court, but, in any event, we deem it necessary to say little in reply to it.

The judgment below was based upon the contract contained in these statutes. The State's suit was based on an alleged condition subsequent in such contract. The courts below gave effect to the subsequent legislative declaration of forfeiture based on such contract. How can the State now say there was no contract and no condition? The supreme court said on the first appeal: "The action is to enforce the obligations of the contract and not to impair them (R., p. 215).

But if there be a trust it must be one to promote navigation. How can the completion of the canal, which counsel for the State say in one breath is the primary purpose of these statutes, be in derogation of the trust to promote navigation, which they declare in another? The canal is (they say) to allow passage around the shoals at the confluence of the Broad and Saluda rivers (at Columbia); the diversion dam across the river, of which they complain (at least in oral argument), is the dam at the head of the canal (at Bull's Sluice) to divert the river water into the canal. How can this dam which is necessary to the canal be an obstruction to navigation?

The diversion dam has locks to let boats pass into the canal. This dam and locks were built by Bryon Holley, engineer for the Board of Trustees, under the Act of 1887. (See witness Lee, R., p. 81.) This was before the conveyance to the Columbia Water Power Company in 1892 and pursuant to the directions of the Act of 1887. The State bore the burden of promoting navigation through the canal

(sections 5 and 6 of Act of 1887), as it bore the burden of attending the locks (90 S. C., 577), which it has never done (witness Kind, R., p. 102). How, then, can it now complain in these particulars?

The contract of defendant and its predecessor under the Acts of 1887-1890 has been recognized as granting property rights within the protection of the Federal constitution in every case in every court. *Columbia Water Power Company vs. Campbell*, 75 S. C., 74; *Columbia Water Power Company vs. Columbia Electric Street Railway, Light & Power Company*, 43 S. C., 154; 172 U. S., 475; 43 L. Ed., 521; *State vs. Columbia Water Power Company*, 82 S. C., 181; 85 S. C., 113; 90 S. C., 568, all of which are cited in our former brief.

But if there be a trust to complete the canal, is this good reason for the State to confiscate the property (especially including improvements), or should the State enforce the duty or covenant to complete, or, simpler still, should the State accept defendant's offer to complete?

There was no Repudiation.

Counsel for the State in some parts of their brief rely upon the proposition that plaintiff in error never denied its obligation to complete, but "acknowledged the obligation," as in the middle of page 14, and then again rely on the position that plaintiff in error denied the obligation, as on page 8. We do not undertake to explain the changing position on their part, but we can explain the facts.

Referring to the record, we find that in appearing before the legislative committees the State abundantly proves by

its witnesses that plaintiff in error never denied an obligation—a covenant, we will say—to complete the southern half. See Christensen, page 67: "I don't remember that these representatives ever denied the liability of defendant to build the canal from Gervais street down to Rocky Branch." McMaster, page 68: "I never heard them deny that they were obligated to build the canal to Rocky Branch." They made different propositions but "always acknowledged the obligation": page 69: "I never heard Mr. Abney or Mr. Herbert, down there representing the canal interest, deny that the obligation rested upon the holders of this canal to build it down to Rocky Branch." To prevent confusion in the mind of the court, at that period, Mr. Abney represented the plaintiff in error, although later he was counsel for the State in bringing the suit (Record, p. 69; p. 14). He repeats this frequently (p. 69).

All of the citations of so-called denial of obligation or refusal to complete occur in communications before the Canal Commission or in correspondence with that Commission. And each of these communications is made under the privilege allowed in South Carolina that efforts to compromise shall not be used against either party. *Smith Machine Co. vs. Johnston*, 102 S. C., 130, 139. Each letter was founded on such a right (R., pp. 145, 147, 156). And the appearance at the conference with the Commission was on the same basis (R., pp. 157, 152, 154, 155). The Commission itself recognized the right so to negotiate (R., p. 155).

To make the matter clear, during all this correspondence with the Commission and the interviews with it plaintiff in error was not facing the single proposition of completing the southern half of the canal, but was under the menace

of the Act of 1917, which declared a forfeiture because none of the "conditions" of the Act of 1887 had been fulfilled or complied with.

These failures, as declared by the Act of 1917, were:

a. To develop 10,000 horse-power at Gervais street.

b. Failure to keep the canal open for navigation.

c. Complete within two years so as to carry a body of water 150 feet wide at the top, 110 feet wide at the bottom, and 10 feet deep.

d. Other particulars in Act of 1887.

e. As soon as practicable complete the southern half.

The act not only declared a failure to do these things, but a refusal to do them.

To have admitted its "obligation" at that time would have been an admission that it had not done any of the things enumerated above, which the trial proved had been done, except item *e*.

On the trial the State was unable to produce any evidence, even from its own witnesses, to substantiate any fact but non-completion south of Gervais street, and, although the issue is now on that point alone, it should not be overlooked that, when appearing before the Canal Commission and in its correspondence with it, plaintiff was menaced with a failure to do all of the things set forth above.

But, in order to preserve its rights, while it denied any obligation with respect to them all, it clearly recognized a duty with respect to completion south of Gervais street, because plaintiff in error:

a. Offered $50,000 (R., p. 145) and later $75,000 (R., p. 156) to be relieved from completing the southern half.

b. Appeared by counsel in an effort to compromise (R., p. 152).

c. Asked the Commission through counsel, if it had a proposition which, if made, would be accepted (R., p. 152) and, in the same way,

d. Asked the Commission for any plans or specifications which it could consider.

e. Offered to go into an informal discussion of compromise (R., p. 154).

f. Offered to consider completion as a basis of compromise and received no answer (R., p. 152).

Respectfully submitted,

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J. B. S. LYLES,
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APPENDIX.

An Act to Provide for the Operation, Management, Control, and Disposal of the Columbia Canal.

32 Stat. S. C., 1556.

SECTION 1. Columbia Canal Commission.—*Be it enacted by the General Assembly of the State of South Carolina*, That a Commission, to be known as "The Columbia Canal Commission" be, and the same is hereby, created. That the said Commission shall consist of three persons, who shall be appointed by the Governor upon the recommendation of the Chairman of the Finance Committee of the Senate, the Chairman of the Ways and Means Committee of the House, the Chairman of the Judiciary Committees of the Senate and the House, and the Attorney General, or a majority of them. That in the case of a vacancy on said Commission, caused by death, resignation, or otherwise, the Governor shall appoint some person to fill such vacancy as may be designated or recommended by the above-named officers or a majority of them. That in the event of a vacancy on said Commission and during such vacancy the remaining member or members shall discharge the duties herein imposed upon the whole Commission.

SECTION 2. Organization—Official Bonds—Duties of Treasurer.—That said Commission shall organize by choosing one of its members as Chairman and another as Secretary and Treasurer. That the Treasurer shall give bond with some Surety Company authorized to do business in this State as surety in the sum of twenty thousand ($20,000.00) dollars to the State of South Carolina in the form provided by section 652, Code of Laws, 1912, volume 1. That each member of said Commission shall give similar bond in the sum of ten thousand ($10,000.00) dollars, the premiums on said bonds to be charged by the said Commissioners as an ex-

pense allowed hereunder. The Treasurer shall have power to receive and shall have custody of all moneys received by the Commission, and shall deposit and disburse the same in such manner as may be prescribed by the said Commission. He shall keep, or cause to be kept, an accurate record of all receipts and disbursements, and when ordered so to do by the Commission or by direction of the Legislature, he shall turn over all unexpended balances to the State Treasurer.

SECTION 3. When Duties of Commission Begin.—That the powers and duties of the said Columbia Canal Commission shall begin when and as soon as the present action by the State against the Columbia Railway, Gas & Electric Company for possession of the property known as the Columbia Canal and the lands held therewith, shall terminate in favor of the State.

SECTION 4. To Take Control of Canal, etc.—Immediately upon the right of the State thereto, the said Commission shall for and on behalf of the State of South Carolina take possession, control, management, and direction of the property known as the Columbia Canal, its appurtenances and the lands held therewith and the improvements placed thereon which have become a part and parcel of said canal property.

SECTION 5. Duties and Powers of Commission.—That the said Commission shall do all acts and things necessary for the reasonable protection, preservation and repair, upkeep and operation of the said property as in its judgment may be necessary for the best interest of the State. That it shall employ such suitable and competent person or persons as may be necessary for the operation, upkeep, protection, repair, and management of said canal and the hydro-electric plants now located thereon. That it shall have the power, and it is hereby required, if practicable, to sell or dispose of all electricity which may be generated by means of the power plant or plants on said canal upon such reasonable

terms and conditions as may be for the best interest of the State, or it may lease or rent the entire property, or any part thereof, upon such terms as it may deem best. But no contract or agreement for sale or disposal of such electric current or power or for the lease of the property, or any part thereof, shall extend for a period of more than one year, and shall be subject to revocation at any time by the Legislature of this State. That said Commission shall collect, by legal process if necessary, and receive all funds arising from the sale or disposal of such electric current, or from a lease or rental of the property, and its receipt to the purchaser or purchasers, consumer, or consumers thereof, or to the lessee or tenant, shall be a full acquittance for any obligation therefor. That the said Commission shall have power to receive and collect any and all funds that may be due by any corporation or person whatsoever from the use of the canal property or any of the water or water-power of said canal, or for electric current, power, or service heretofore supplied from the said Columbia Canal, and to which the State of South Carolina may under the law be entitled, and in case any person or corporation shall be liable for the payment of any sum or sums of money to the State on account of such use or service and shall fail or refuse to deliver the full and just amount thereof to the Columbia Canal Commission, the said Commission may institute in the name of the State and for and in its behalf such suit or suits at law or in equity in any court of this State of general jurisdiction to recover the same. That the said Commission may employ such clerical assistance as they may find necessary for the purposes of carrying out the provisions of this act, as well as a competent engineer or engineers, and legal counsel, as may be necessary and as they may deem to be for the best interest of the State: *Provided*, That such legal counsel shall be employed by the said Commission in conjunction with the Attorney General and the Attorney General shall have charge of legal proceedings in any such action as may be brought in reference to said canal.

SECTION 6. To Secure Plans for Completion of Canal—Reports to General Assembly.—That for the consideration of the General Assembly and for the purpose of obtaining information as to the best manner and mode of completing the said canal for the purposes of navigation, and incidentally for the development of power, the said Commission shall be required to confer and consult with proper Federal authorities as to the best mode and plans for completing the said canal so as to secure the satisfactory navigation thereof in connection with the Congaree River and for the purpose of ascertaining plans for the maximum development of all power in connection therewith. That for the above purposes they shall confer and consult with the Federal Power Commission and the Chief of Engineers of the United States Army, or such other Federal authorities as may be necessary or desirable. That the said Commission shall advertise for and receive proposals for the sale or leasing of the said canal property upon terms most advantageous to the State, such proposal or proposals for the purchase or lease of the said property to be specifically conditioned upon the completion of the said canal for the purpose of navigation. That the said Commission shall report to the next session of the General Assembly its acts and doings under the provisions of this act, and if practicable its conclusions as to the best manner and mode of completing said canal: *Provided*, That the said property shall not be finally disposed of without the consent of the General Assembly of South Carolina.

SECTION 7. Compensation of Commission—Expenses.—That each member of the Committee shall receive as compensation for his services ten ($10.00) dollars per day and necessary expenses, while in the actual discharge of the duties of said Commission. That all persons employed by the Commission under the provisions hereof shall receive such compensation as is usually paid for the services required of them

and as may be determined by the Commission. That said Commission shall defray and pay all of the expenses herein provided from such fund or funds as they may collect under the provisions of this act, and shall not incur any expense which cannot be paid from such collections, and shall account to the General Assembly annually its receipts and disbursements as well as its other acts and doings.

SECTION 8. Discharge of Former Commission.—That upon the Columbia Canal, its appurtenances and lands held herewith, being taken over by the Columbia Canal Commission as provided for under this act, the Attorney General, the Chairman of the Judiciary Committees of the Senate and House of Representatives, the Chairman of the Finance Committee of the Senate, the Chairman of the Ways and Means Committee of the House of Representatives shall as a Committee and as to their joint duties stand discharged and released from any further duties imposed by the terms of the act relating to the operation, management, control, disposal or sale of said canal, approved March 12th, 1917.

SECTION 9. Commission to Act on Behalf of State.—That the Commission herein provided for, when properly appointed and commissioned, shall be officers of the State of South Carolina and their taking over the management, control and disposition of said Columbia Canal property and the rights of the State growing out of or incident thereto as herein provided shall be solely for and on behalf of the State of South Carolina, and neither the said Commission nor any member thereof shall be subject to suit in any court whatsoever without specific consent of the State as may be hereafter granted by act of the General Assembly.

SECTION 10. This act shall take effect immediately upon its approval by the Governor.

Approved the 22d day of March, A. D. 1922.